

CH

C

THE

FROM

AMERICAN CRIMINAL REPORTS.

A SERIES DESIGNED TO CONTAIN THE LATEST
AND MOST IMPORTANT

34

CRIMINAL CASES

DETERMINED IN

THE FEDERAL AND STATE COURTS IN THE UNITED STATES,

AS WELL AS

SELECTED CASES,

IMPORTANT TO AMERICAN LAWYERS,

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN LAW REPORTS

WITH

NOTES AND REFERENCES.

By JOHN G. HAWLEY,

LATE PROSECUTING ATTORNEY AT DETROIT.

VOL. II.

CHICAGO:
CALLAGHAN & COMPANY, LAW BOOK PUBLISHERS.
1880.

DEC 17 1953

101922

Entered according to Act of Congress, in the year eighteen hundred and eighty, by
CALLAGHAN & COMPANY,
in the office of the Librarian of Congress, at Washington, D. C.

Stereotyped and Printed at the
DETROIT FREE PRESS PRINTING HOUSE.

Adams v.
Ah Ling
Albrecht
Allen v.
Anderso
Anderso
Archer
Ardaga,

Baker v.
Baker v.
Ballinga
Barton v.
Beall, S
Bloedow
Bohan, I
Bonker
Bowers
Bowers
Brown, I
Brown v.
Buchma
Bybee, S

Carroll
Carroll
Carson,
Chidest
Clay v.
Collins
Conley
Coyle, S
Cox v. I
Crofton
Crowley

TABLE OF CASES

REPORTED IN THIS VOLUME.

	PAGE.
Adams v. State.....	393
Ah Ling, People v.....	482
Albrecht v. State.....	401
Allen v. State.....	441
Anderson, State v.....	100
Anderson v. State.....	198
Archer v. State.....	404
Ardaga, People v.....	590

B.

Baker v. State.....	337
Baker v. State.....	606
Ballingall, State v.....	376
Barton v. State.....	340
Beall, State v.....	463
Bloedow, State v.....	631
Bohan, State v.....	278
Bonker v. People.....	79
Bowers v. State.....	592
Brown, State v.....	423
Brown v. People.....	586
Buchman v. State.....	187
Bybee, State v.....	449

C.

Carroll v. Commonwealth.....	290
Carroll v. State.....	424
Carson, State v.....	58
Chidester v. State.....	153
Clay v. People.....	381
Collins v. Commonwealth.....	282
Conley v. People.....	445
Coyle, State v.....	149
Cox v. People.....	329
Crofton v. State.....	378
Crowley, State v.....	83

	PAGE.
Daniel v. State.....	421
Davis v. Commonwealth.....	163
Dickinson, State v.....	1
Dockstader, State v.....	469
Doepke, State v.....	638
Driver, State v.....	487

E.

Elliott, State v.....	323
Erwin v. State.....	251

F.

Ford v. State.....	161
Foster, Commonwealth v.....	499

G.

Garst, Ex parte.....	618
Gosha v. State.....	589
Grady, Commonwealth v.....	105
Gregory v. State.....	145
Griffith, State v.....	634

H.

Habersham v. State.....	45
Hardie, State v.....	326
Harris v. People.....	416
Hawes, Commonwealth v.....	201
Hawes, State v.....	594
Hawkins v. People.....	178
Hays, State v.....	630
Holbrook, Regina v.....	643
Holley v. State.....	250
Hood v. State.....	165
Horneman, State v.....	427
Hoskins v. People.....	484

AMERICAN CRIMINAL REPORTS.

	PAGE.
Housh v. People	465
Howard v. State	446
Husband, People v.	111
Hutchinson v. Commonwealth..	362
Hynes, State v.	392

J.

Jacobs, People v.	102
Jilz, Ex parte	217
Joaquin, State v.	650
Johnson v. People	396
Johnson v. State	430

K.

Kaufman, State v.	636
Kee v. State	263
Kellogg v. State	96
Kent, State v.	107
Keesler, State v.	331
Kilcrease, State v.	652
Kistler v. State	18
Knott v. People	184
Kolbe v. People	177
Kribs v. People	109
Kribs v. People	114
Kring, State v.	313

L.

Lapage, State v.	506
Lee, State v.	61
Leicham, State v.	117
Lewis v. People	75
Loomis v. People	345
Lowe v. State	344
Lymus, State v.	338

M.

McDonald v. State	493
McNair v. State	583
McPherson v. Commonwealth..	636
Mahoney, State v.	408
Meredeth v. People	448
Moon, State v.	64
Moore, Regina v.	008
Morgenstern v. Commonwealth..	476
Morrisette, People v.	475

N.

	PAGE.
Neff, State v.	176
Norris v. State	85

P.

Paul, Territory v.	332
Pearsall, State v.	380
Pistorius v. Commonwealth.....	284

R.

Ramsay, State v.	133
Ratekin v. State	32
Rembert v. State	141
Reneau v. State	624
Reynolds v. People	480
Richardson, Commonwealth v.	612
Rickart v. People	385
Robinson, State v.	654
Rosenblatt, Ex parte	215
Runyan v. State	313

S.

Sacramento, U. S. v.	443
Schwartz, v. Commonwealth....	410
Semler, Petition of	242
Shannon v. State	56
Sharley v. State	138
Sly, State v.	51
Smith v. State	372
Smith v. State	485
Snyder, In re	228
Sparrenberger v. State	470
Stanley v. State	349
Starr, State v.	390
Stewart, State v.	603

T.

Taylor v. State	13
Thompson, State v.	486

W.

Walls, State v.	23
Ward, State v.	27
Whitcomb, Territory v.	159
White v. State	454
Wiles, State v.	621
Williams v. Commonwealth.....	67
Wilson v. State	182
Wilson v. State	356
Winthrop, State v.	374
Wilkinson v. State	596

Abbey,
Abraham
Acree v
Adams,
Adams
Addis, I
Alderm
Allen, F
Allen, R
Allen v.
Allen v.
Allison
Almon,
Ames' C
Anderso
Anderso
Andrew
Andrew
Ashbur
Atkins
Ayer, C

Baggers
Bailey,
Bakem
Baker,
Ball, P
Balls, R
Bangs,
Barlow,
Barnar
Barnett
Barrett
Bartlett
Bartlett

TABLE OF CRIMINAL CASES

CITED AND REFERRED TO.

A.		PAGE.		PAGE.
Abbey, State v.....	29 Vt., 60.....	18	Battiste, U. S. v.....	2 Sumner, 240.. 51
Abrahams, State v....	6 Iowa, 117.....	377	Baxter v. People.....	8 Ill., 368..... 263
Acree v. Com.....	13 Bush, 353.....	410	Beale v. Com.....	1 Casey, 11..... 495
Adams, People v.....	3 Denio, 190.....	88	Beall v. State.....	15 Ind., 378..... 353
Adams v. People.....	1 Comst., 173....	88	Beckwith v. People...	26 Ill., 500..... 481
Addis, Rex v.....	6 C. and P., 388, 305		Bell v. State.....	4 Gill, 301..... 227
Alderman v. People...	4 Mich., 414.....	36	Bell v. State.....	44 Ala., 393..... 628
Allen, People v.....	5 Denio, 76.....	115	Bennett, State v.....	14 Iowa, 479..... 350
Allen, Rex v.....	1 Moody Cr. 154, 64		Benson, People v.....	6 Cal., 221..... 591
Allen v. State.....	10 Ohio St., 287..	89	Bentley, State v.....	44 Conn., 537.... 273
Allen v. State.....	54 Ind., 161.....	628	Bergen v. People.....	17 Ill., 426..... 284
Allison v. People.....	45 Ill., 37.....	607	Biddle, State v.....	54 N. H., 379.... 391
Almon, Rex v.....	5 Burr., 2986.....	644	Black v. State.....	42 Tex., 378..... 263
Ames' Case.....	2 Me., 365.....	151	Blair, In re.....	4 Wis., 522..... 245
Anderson v. State....	14 Geo., 246.....	132	Blanding, Com. v.....	3 Pick., 304..... 88
Anderson v. State....	37 Ind., 553.....	469	Bleasdale, Reg. v.....	2 C. and K., 765, 522
Anderson v. State....	48 Ala., 665.....	465	Bloom, State v.....	17 Wis., 521..... 245
Andrews, Com. v.....	2 Mass., 409.....	359	Blos, Com. v.....	116 Mass., 56..... 391
Andrews v. People...	60 Ill., 354.....	84	Blythe v. State.....	4 Ind., 535..... 195
Ashburn v. State....	15 Geo., 246.....	132	Bodin, People v.....	1 Dana, 282..... 470
Atkins v. State.....	16 Ark., 568, 326, 432		Boomer, Com. v.....	97 Mass., 587.... 61
Ayer, Com. v.....	8 Cush., 150.....	151	Bond v. State.....	17 Ark., 290..... 629
B.			Bonner, Rex v.....	6 C. and P., 386, 323
Baggers v. State.....	43 Tex., 347.....	358	Bonny, State v.....	39 N. H., 206.... 409
Bailey, Reg. v.....	2 Cox Cr., 311..	521	Booth, Ex parte.....	3 Wis., 145..... 248
Bakeman, Com. v.....	105 Mass., 53.....	439	Brady, State v.....	27 Iowa, 191..... 375
Baker, Rex v.....	2 M. and R., 53, 7		Bragg v. Com.....	10 Gratt., 722.... 284
Ball, People v.....	14 Cal., 101.....	343	Brandon v. People....	42 N. Y., 265.... 61
Balls, Reg. v.....	7 C. and P., 429, 522		Brannan, People v....	47 Cal., 96..... 483
Bangs, Com. v.....	9 Mass., 387.....	9	Brann, State v.....	31 Wis., 601..... 120
Barlow, Com. v.....	97 Mass., 597....	408	Breese v. State.....	12 Ohio St., 146.. 156
Barnard, Rex v.....	1 C. and P., 88..	307	Brennan v. People....	15 Ill., 512..... 435
Barnett v. People.....	54 Ill., 325.....	496	Briceland v. Com.....	24 P. F. Smith,
Barrett, Reg. v.....	12 Cox Cr., 498..	586		463... 396
Bartlett, State v.....	30 Me., 132.....	87	Briggs, State v.....	84 Vt., 593..... 142
Bartlett, State v.....	11 Vt., 650.....	350	Brisas & Scott, Rex v.	4 East., 163.... 88
			Britton, State v.....	4 McCord, 256.. 17
			Brown, Com. v.....	121 Mass., 69..... 501
			Brown, People v.....	47 Cal., 447..... 588

	PAGE.		PAGE.		
Brown, People v.....	48 Cal., 253.....	203	Cearfoss v. State.....	42 Md., 403.....	404
Brown, State v.....	1 Hayn., 100.....	353	Chandler, Com. v.....	2 Thatch. Cr.,	
Brown, State v.....	4 Port., 410.....	471		187.....	151
Brown, State v.....	4 La. Ann., 505.....	263	Chapman, Com. v.....	13 Mete., 72.....	30
Brown v. Com.....	76 Pa. St., 319.....	539	Chappel, Com. v.....	116 Mass., 7.....	391
Brown v. State.....	52 Ala., 338.....	18	Chapin, State v.....	2 Swan, 493.....	623
Brown v. State.....	18 Ohio St., 509.....	426	Charles v. State.....	6 Eng., 389.....	584
Brown v. State.....	38 Tex., 482.....	273	Choate, Com. v.....	105 Mass., 451.....	518
Brown v. State.....	16 Ind., 495.....	442	Christian v. Com.....	5 Mete., 530.....	494
Bubser, Com. v.....	14 Gray, 84.....	53	Church, Com. v.....	1 Barr., 110.....	497
Buchanan, State v.....	5 Har. & J., 317.....	37	Clackner v. State.....	33 Ind., 412.....	375
Bullard v. State.....	38 Tex., 504.....	629	Clark, People v.....	10 Mich., 310.....	37
Bunne, Rex v.....	7 Ad. and E., 58.....	494	Clark, State v.....	42 Vt., 629.....	263
Burden, People v.....	9 Barb., 469.....	413	Clarkson, State v.....	3 Ala., 378.....	474
Burdick, Com. v.....	2 Barr., 163.....	36	Clem v. State.....	42 Ind., 420.....	438
Burgdorf, State v.....	53 Mo., 65.....	588	Clewes, Rex v.....	4 C. and P., 221.....	519
Burk, Com. v.....	11 Gray, 437.....	409	Cline v. State.....	43 Tex., 491.....	102
Burke, Com. v.....	105 Mass., 376.....	586	Clough, People v.....	17 Wend., 351.....	36
Burke v. State.....	47 Ind., 538.....	184	Cobb v. People.....	84 Ill., 511.....	448
Burns v. State.....	49 Ala., 370.....	12	Coffman v. Com.....	10 Bush., 495.....	273
Burns v. State.....	48 Ala., 195.....	162	Cohen, People v.....	8 Cal., 42.....	115
Burnside, State v.....	37 Mo., 343.....	337	Coker v. State.....	20 Ark., 53.....	326
Burrow v. State.....	12 Ark., 65.....	240	Coleman v. People.....	55 N. Y., 90.....	548
Burt v. State.....	23 Ohio St., 394.....	558	Collier v. State.....	20 Ark., 39.....	336
Burnett, People v.....	5 Park. Cr., 113.....	227	Collins, Com. v.....	1 Mass., 116.....	350
Butterick, Com. v.....	100 Mass., 1.....	114	Collins, Reg. v.....	2 M. and R., 46.....	148
Butler v. State.....	22 Ala., 43.....	142	Conner, Rex v.....	2 C. and K., 518.....	269
Button, Reg. v.....	11 Ad. and E., N.		Cook v. People.....	51 Ill., 144.....	179
	S., 946.....	428	Coolidge, U. S. v.....	2 Gall., 363.....	473
Bynam v. State.....	17 Ohio St., 142.....	156	Cooper, State v.....	2 Zab., 52.....	4
			Corbin, People v.....	56 N. Y., 363.....	566
			Cornelius v. Com.....	3 Mete. (Ky.),	
C.				481.....	377
Cain, State v.....	1 Hawks, 352.....	133	Cornwell v. People.....	13 Mich., 437.....	586
Caldwell, U. S. v.....	8 Blatchf., 131.....	213	Costello, Com. v.....	120 Mass., 338.....	501
Call, Com. v.....	21 Pick., 509.....	172	Cotton, Reg. v.....	12 Cox Cr., 400.....	519
Canceme v. People.....	18 N. Y., 138.....	638	Cowan, State v.....	29 Mo., 330.....	54
Cameron, State v.....	2 Penn., 495.....	4	Craig, State v.....	23 Ind., 185.....	169
Campbell, People v.....	4 Park Cr., 389.....	340	Crandall, In re.....	34 Wis., 177.....	245
Campbell v. State.....	9 Yerg., 333.....	423	Creek v. State.....	24 Ind., 151.....	320
Camplin, Reg. v.....	1 Cox Cr., 220.....	586	Creighton, Rex v.....	R. and R., 62.....	115
Canney v. State.....	19 N. H., 135.....	472	Creson, State v.....	38 Mo., 372.....	375
Carberry v. State.....	11 Ohio St., 411.....	144	Crissie, People v.....	4 Denio, 525.....	36
	152.....	156	Crocket v. State.....	33 Ind., 416.....	601
Carkhuff, People v.....	24 Cal., 640.....	12	Cunningham, Com. v.,	13 Mass., 245.....	623
Carroll v. State.....	5 Neb., 1.....	263	Curry v. State.....	4 Neb., 548.....	426
Carroll v. State.....	3 Humph., 315.....	271	Curtis, Com. v.....	11 Pick., 133.....	133
Carpenter v. People.....	4 Scam., 197.....	481	Curtis v. State.....	6 Cold., 9.....	375
Carson v. State.....	50 Ala., 134.....	263	Cutler v. State.....	42 Ind., 246.....	183
Carter v. State.....	2 Ind., 617.....	51			
Cashiel, U. S. v.....	1 Hughes C. C.,				
	552.....	55			
Cassels, People v.....	5 Hill, 164.....	245			
Caton, People v.....	25 Mich., 358.....	152			
Cavanagh, People v.....	2 Park. Cr., 650.....	227			
Cayford's Case.....	7 Me., 57.....	17			

D.

Da Costa, Ex parte...	1 Park. Cr., 129.....	224
Darley, Com. v.....	12 Cush., 80.....	628
Dallinger, Com. v.....	118 Mass., 439.....	500
Damon, People v.....	13 Wend., 354.....	459

Daniels
Davis, P.
Davis, S.
Davis, S.
Davis v.
Davis v.
Dawell,
Dean, P.
Dearborn
Defrese
Dement
Dempse
Dill v. S.
Dillingham

Dingman
Dodge v.
Don Mon
Dorr, St.
Dosssett,
Dourder
Drew, C.
Drew v.
Dula, St.

Dumphy
Duncan

Dunn, C.
Dunne,
Dyke, R.

Earl, St.
Earp v.
Eastma
Edgerly
Edgert
Edward
Ellington
Elliot
Ellis, C.
Ellis, R.

Ellis, S.
Ellis &
Elsing
Ender
Engle
Ennis
Eno, S.
Enoch
Evans

TABLE OF CASES CITED.

vii

	PAGE.
Daniels v. Com.....	7 Barr, 371..... 496
Davis, People v.....	56 N. Y., 103..... 5
Davis, State v.....	29 Mo., 391..... 263
Davis, State v.....	41 Iowa, 311..... 323
Davis v. State.....	42 Tex., 494..... 358
Davis v. Com.....	13 Bush., 318..... 611
Dawell, People v.....	25 Mich., 247..... 171
Dean, People v.....	14 Mich., 406..... 637
Dearborn, Com. v.....	109 Mass., 368..... 525
Defrese v. State.....	3 Helsk., 53..... 522
Dement, Ex parte.....	53 Ala., 389..... 187
Dempsey, State v.....	9 Ired., 384..... 638
Dill v. State.....	59 Ind., 15..... 187
Dillingham v. State...	5 Ohio St., 280... 36 88, 240
Dingman v. State.....	Wis., Feb., 1880, 607
Dodge v. State.....	4 Zab., 455..... 415
Don Moran v. People..	25 Mich., 356..... 586
Dorr, State v.....	33 Me., 498..... 107
Dossett, Reg. v.....	2 C. and K., 306, 530
Dourden, State v.....	2 Dev., 443..... 152
Drew, Com. v.....	19 Pick., 179... 36, 240
Drew v. Com.....	1 Whart., 279... 496
Dula, State v.....	Phil. Law (N. C.), 211... 496
Dumphy, State v.....	4 Minn., 438... 326
Duncan v. Com.....	6 Dana (Ky.), 295... 53
Dunn, Com. v.....	8 P. F. Smith, 17, 286
Dunne, Reg. v.....	5 Cox Cr., 507... 307
Dyke, Reg. v.....	8 C. and P., 261, 305

E.

Earl, State v.....	41 Ind., 464..... 184
Earp v. State.....	50 Ga., 513..... 57
Eastman, Com. v.....	1 Cush., 189... 36, 521
Edgerly, Com. v.....	10 Allen, 134..... 523
Edgerton v. Com.....	5 Allen, 514..... 504
Edwards, Reg. v.....	12 Cox Cr., 230... 8
Ellington, State v.....	7 Ired. Law, 61, 263
Elliott's Case.....	Leach Cr., 175, 151
Ellis, Com. v.....	11 Mass., 465..... 496
Ellis, Rex v.....	5 Barn. and C., 395... 494
Ellis, State v.....	3 Conn., 185..... 350
Ellis & T. v. State.....	42 Ala., 525... 162
Elsington, Reg. v.....	9 Cox Cr., 88..... 623
Enders v. People.....	20 Mich., 333..... 87
Engleman v. State.....	2 Ind., 91..... 375
Ennis v. State.....	3 Iowa, 67... 98
Eno, State v.....	8 Minn., 230..... 622
Enoch, Rex v.....	5 C. and P., 539, 277
Evans v. State.....	8 Ohio St., 196, 152 155

Evans v. State.....	24 Ohio St., 458... 394
Evers, State v.....	49 Mo., 542... 88, 240

F.

Fahnestock v. State...	23 Ind., 231..... 263
Fairfield, State v.....	37 Me., 517..... 410
Farler, Reg. v.....	8 C. and P., 106, 305
Farris v. State.....	3 Ohio St., 171... 88
Fay, State v.....	43 Iowa 651..... 60
Fee, State v.....	19 Wis., 565..... 120
Felter, State.....	32 Iowa, 53..... 604
Ferguson v. State.....	49 Ind., 33..... 317
Ferrel v. Com.....	1 Duval, 153... 250
Ferrigan, Com. v.....	8 Wright, 338... 307 520
Fields, Com. v.....	4 Leigh, 648... 586
Finch v. State.....	15 Fla., 250
Finn v. Com.....	5 Rand., 701... 284
Fisher, State v.....	3 Ired., 111..... 138
Fletcher, Rex v.....	R. and R., 53... 506
Floyd, State v.....	15 Mo., 349..... 375
Foster, Com. v.....	107 Mass., 231, 108, 110
Foster, Com. v.....	114 Mass., 311..... 500
Foster, Reg. v.....	Dears. Cr., 456, 523
Foster, State v.....	37 Iowa, 404... 110
Foster, State v.....	61 Mo., 548..... 313
Fox v. Ohio.....	5 How. (U. S.), 410... 53
Fox, State v.....	25 N. J. L., 568... 263
Franklin v. State.....	12 Md., 230..... 51
Frazie v. State.....	23 Ohio St., 551... 253
Free v. State.....	13 Ind., 334..... 357
Freeland v. People...	16 Ill., 380..... 55
Freeland, State v.....	16 Kas., 9..... 428
French v. People.....	3 Park. Cr., 114, 409
Frengan, Com. v.....	44 Pa. St., 586... 326
Froiseth, State v.....	16 Minn., 296... 132

G.

Gahagan v. People...	1 Park. Cr., 373, 17
Gale v. People.....	26 Mich., 159... 61
Galloway, People v...	17 Wend., 540... 143
Ganalso v. State.....	11 Ohio St., 114... 63
Gardner, People v...	2 Johns., 477... 353
Gardner v. People...	20 Ill., 430..... 53
Garner, Rex v.....	3 F. and F., 681, 519
Garrett, Rex v.....	22 Eng. L. and E., 607... 89
Gibbons, R. v.....	12 Cox Cr., 237... 609
Gibson v. State.....	36 Ind., 389... 162
Gillespie, Com. v.....	7 Serg. and R., 469... 37, 88
Gilmore, People v.....	4 Cal., 378..... 441
Gingo v. State.....	39 Ga., 470... 226

	PAGE.
Girault, U. S. v.	11 How., 22 504
Girts v. Com.	23 Pa. St., 351... 505
Goodhall, Reg. v.	R. and R., 461, 36, 88
Goodenow, State v.	65 Me., 30..... 611
Gordon, People v.	40 Mich..... 67
Gray, Reg. v.	4 F. and F., 1102, 520
Gregg, In re.	15 Wis., 479..... 246
Gregor, State v.	21 La. Ann., 473, 325
Green, State v.	7 Wis., 676...36, 88
	240
Greenough, In re.	31 Vt., 279..... 107
Griffin's Case.	1 R. and R., 151, 71
Griffin, People v.	2 Barb., 427..... 88
Griffin v. State.	26 Ga., 493..... 88
Griner, In re.	16 Wis., 423..... 246
Griswold v. State.	24 Wis., 444..... 121
Gummer, State v.	22 Wis., 441..... 120
Guenther v. People.	24 N. Y., 100...438, 505
Gutch, Rex v.	Moo. & Mack, 433.... 645

H.

Hackett, Com. v.	2 Allen, 136..... 269
Hackney v. State.	8 Ind., 494..... 169
Hall v. State.	40 Ala., 698..... 519
Hamilton, People v.	46 Cal., 540..... 592
Hamilton v. People.	29 Mich., 173..... 50
Hamilton v. State.	11 Ohio, 435..... 350
Hamilton v. People.	29 Mich., 183..... 633
Hammond v. People.	32 Ill., 446..... 227
Hanser, State v.	33 Wis., 678..... 245
Harding, U. S. v.	1 Wall., jr., C. 147,.... 438
Harrington, People v.	42 Cal., 165..... 314
Harris, Com. v.	22 Pa. St., 253... 43
Harrison, Com. v.	11 Gray, 308 429
Harrison, People v.	8 Barb., 560..... 144
Hastings, Rex v.	7 C. and P., 153, 307
Haughey, Com. v.	3 Mete. (Ky.), 223... 106
Hawkins, Com. v.	11 Bush., 603.... 54
Hayden, State v.	45 Iowa, 17..... 604
Haynes, People v.	14 Wend., 546, 88, 101
	239
Hays, People v.	25 N. Y., 390..... 15
Hazen v. Com.	11 Harris, 365, 37, 371
Hazy, Rex v.	2 C. and P., 458, 64
Healey, State v.	48 Mo., 531..... 110
Heller v. State.	23 Ohio St., 582.. 447
Helms' Case.	13 Sm. and M., 500... 456
Henry, State v.	5 Jones, 65...23, 271
Hensly v. State.	52 Ala., 10..... 409
Herrick, People v.	13 Wend., 87...87, 208

PAGE.

Hewett, State v.	31 Me., 396..... 36
Hicks v. State.	51 Ind., 407..... 330
Hildebrand v. People.	56 N. Y., 354..... 345
Hill, State v.	30 Wis., 416..... 505
Hill v. Com.	2 Gratt., 594..... 323
Hill v. People.	16 Mich., 351..... 442
Hill v. State.	1 Yerg., 76..... 147
Hind, Reg. v.	8 Cox Cr., 300.. 4
Hinds, Com. v.	101 Mass., 211..... 144
Hinkle, State v.	6 Iowa, 380..... 293
Hodge, State v.	50 N. H., 510...375, 551
Hoggins, Rex v.	R. and R., 145, 108
Holcomb v. People.	79 Ill., 409..... 179
Holt v. People.	13 Mich., 224..... 263
Holt v. State.	38 Geo., 187..... 54
Hood, U. S. v.	2 Cranch, 133... 55
Horne, State v.	9 Kas., 119..... 279
Horner, Rex v.	1 Leach Cr., 305, 317
Horton, Com. v.	2 Gray, 354..... 525
Horton R. v.	11 Cox Cr., 670... 608
Houston, U. S. v.	4 Cranch, 55
Hovey, People v.	5 Barb., 117..... 617
Howard, State v.	32 Vt., 380..... 4
Howe v. State.	9 Mo., 690...220, 227
Hucks, Rex v.	1 Stark., 521..... 323
Huey, State v.	16 Ind., 338..... 169
Huff, State v.	11 Nev., 17..... 60
Hughes, Reg. v.	1 C. and K., 519, 418
Hughes v. State.	4 Iowa, 554..... 626
Hulbert, People v.	4 Denio, 133..... 474
Hull, State v.	34 Conn., 132... 177
Humphrey, People v.	7 Johns., 314..... 17
Hunt, Com. v.	4 Mete., 111..... 36
Hunter v. Com.	29 P. F. Smith, 503... 361
Hurd v. People.	25 Mich., 405..... 82
Hurt v. State.	25 Miss., 378..... 438

I.

Israel v. State.	8 Ind., 467..... 195
-----------------------	----------------------

J.

Jackson, Com. v.	11 Bush., 679..... 17
Jackson, In re.	15 Mich., 423..... 244
Jackson, People v.	3 Will., 92 447
Jackson, State v.	17 Miss., 544..... 326
Jackson v. Com.	23 Gratt., 919..... 263
Jackson v. State.	14 Ind., 327..... 261
Jacquins v. Com.	9 Cush., 279..... 494
Jane v. Com.	2 Mete. (Ky.), 30, 200, 483
Jenkins' Case.	1 R. and R., 492, 71
Jennings v. State.	16 Ind., 325..... 169
Jennings, Com. v.	121 Mass., 47..... 615
Johnson, Com. v.	8 Cush., 534..... 27

Johnson, P.
Johnson, R.
Johnson, R.
Johnson, M.
Johnson, S.
Johnson v.
Johnson v.
Jones's Cas.
Jones, Com.

Jones, Reg.
Jones, Reg.

Jones, State.
Jones, State.
Jones, State.
Jones v. Sta.
Jones v. Sta.
Jones v. Sta.
Jordan v. S.
Josslyn v. C.
Juneau, Sta.

Kabrick, St.
Kane v. Pe.
Keller, Stat.
Kelly v. Co.
Kelly v. Sta.

Kennedy C.
Kenworthy

Kenyon, Pe.
Kimball, St.
King v. Sta.
Kink v. Co.
Kirby, Stat.
Kirkwood's
Kite v. Com.
Knapp, Sta.
Knowlton,
Krummer,

Labore, St.
Lahey, Cor.
Lambert, I.
Lambert v.
Lamberton.
Lane, Stat.
Lane, Com.
Lange, Ex.
Langtry v.

TABLE OF CASES CITED.

ix

PAGE.		PAGE.	
Johnson, People v.....	46 Cal., 78..... 263	Lash, State v.....	1 Harrison, 380, 173
Johnson, Rex v.....	6 East., 583..... 89	Latham v. The Queen,	9 Cox Cr., 516... 504
Johnson, Rex v.....	3 M. and S., 539, 115	Lathrope v. State.....	50 Ind., 555..... 391
Johnson, State v.....	33 N. H., 441..... 522	Lathrope v. State.....	51 Ind., 192..... 409
Johnson, State v.....	2 Oreg., 115..... 350	Lawrence, U. S. v.....	13 Blatchf., 395... 214
Johnson v. People.....	22 Ill., 314..... 37, 484	Lawrence v. State.....	4 Yerg., 145..... 357
Johnson v. State.....	17 Ala., 618..... 519	Law's Case.....	6 Greenl., 439... 473
Jones's Case.....	1 R. and R., 152, 71	Leach, Com. v.....	1 Mass., 61..... 30
Jones, Com. v.....	3 Serg. and R., 158... 227	Leach, State v.....	7 Conn., 752..... 468
Jones, Reg. v.....	1 Den. Cr., 551, 89	Leagu v. State.....	36 Md., 259..... 629
Jones, Reg. v.....	1 Eng. L. and E., 533... 89	Leake v. State.....	10 Humph., 479... 111
Jones, State v.....	13 Iowa, 269..... 36	Le Blanch, State v.....	2 Vroom, 82..... 333
Jones, State v.....	1 Bay, 205..... 143	Leech, Reg. v.....	Dears., 642... 88
Johnson v. State.....	50 N. H., 369..... 651	Leibey v. Com.	9 Bush., 11..... 282
Jones v. State.....	55 Geo., 625..... 55	Lepising, State v.....	16 Minn., 75..... 428
Jones v. State.....	50 Ala., 161..... 142	Levy v. State.....	6 Ind., 281..... 53
Jones v. State.....	13 Tex., 168..... 436	Lewis' Case.....	9 Sm. and M., 118... 459
Jordan v. State.....	22 Geo., 558..... 438	Lewis v. State.....	30 Ala., 54..... 583
Josslyn v. Com.....	6 Metc., 236..... 501	Lewis, State v.....	27 Hawks., 98... 623
Juneau, State v.....	38 Wis., 554..... 245	Libbey, Com. v.....	11 Metc., 64... 108, 121
K.		Lieb v. Com.....	9 Watts, 200... 306
Kabrick, State v.....	39 Iowa, 277..... 470	Linkham, State v.....	69 N. C., 214... 136
Kane v. People.....	8 Wend., 211... 497	Littlejohn, Com. v.....	15 Mass., 163... 17
Keller, State v.....	12 Mo., 322..... 485	Logan v. State.....	50 Miss., 209... 263
Kelly v. Com.....	1 Grant, 484..... 286	Long, Ex parte.....	11 Mo., 662... 229
Kelly v. State.....	3 Sm. and M., 578... 405	Long, State v.....	74 N. C., 121... 391
Kennedy Com. v.....	119 Mass., 211... 409	Longbottom, State v.....	11 Humph., 39... 342
Kenworthy, Rex v.....	1 Barn. and C., 711... 497	Lord, Com. v.....	3 Metc., 328... 505
Kenyon, People v.....	5 Park Cr., 254, 75	Lorton v. State.....	7 Mo., 55..... 360
Kimball, State v.....	50 Me., 406..... 151	Lowrence v. State....	4 Yerg., 145... 65
King v. State.....	5 How., 730..... 456	M.	
Kink v. Com.....	9 Leigh, 627..... 505	McAllister v. State....	17 Ala., 439..... 269
Kirby, State v.....	9 Yerg..... 12	McCarty, Com. v.....	2 Pa. L., 135... 607
Kirkwood's Case.....	1 Lewin Cr., 103, 518	McClosky, People v.....	5 Park Cr. 53
Kite v. Com.....	11 Metc., 581..... 501	McConologue's Case...	107 Mass., 154... 227
Knapp, State v.....	45 N. H., 148... 536	McCord v. People.....	46 N. Y., 470... 36
Knowlton, Com. v.....	2 Mass., 534..... 32	McCord, State v.....	8 Kas., 232..... 441
Krummer, People v.....	4 Park. Cr., 217, 151	McCormick, Petit'n of,	94 Wis., 492..... 246
L.		McCutcheon v. People,	69 Ill., 601..... 386
Labore, State v.....	26 Vt., 765..... 164	McDaniel v. State....	53 Geo., 253... 57
Lahey, Com. v.....	14 Gray, 91..... 525	McDaniel v. State.....	8 Sm. and M., 401... 323
Lambert, People v.....	5 Mich., 349... 17, 75	McDonald, Com. v.....	110 Mass., 405... 588
Lambert v. People....	9 Conn., 578... 36	McDonald v. People...	43 N. Y., 61..... 345
Lamberton v. State...	11 Ohio, 382..... 88	McGarry v. People....	2 Lans., 227... 60
Lane, State v.....	64 Mo., 319..... 313	McGehan, Ex parte...	22 Ohio St., 227... 253
Lane, Com. v.....	113 Mass., 458... 614	McKisson, Com. v.....	8 Serg. and R., 420... 371, 497
Lange, Ex parte.....	18 Wall., 163... 494	McKune v. State.....	11 Ind., 195..... 343
Langtry v. State.....	30 Ala., 536..... 17	McPike, Com. v.....	3 Cush., 181... 269
		Madge, Reg. v.....	9 C. and P., 29, 353
		Magee, State v.....	11 Ind., 154..... 240

AMERICAN CRIMINAL REPORTS.

	PAGE.
Maher v. People.....	10 Mich., 212..... 82
Mann v. People.....	35 Ill., 467.....181, 607
Manson, Com. v.....	2 Ashm., 31..... 337
March v. People.....	7 Barb., 361..... 36
Marmont v. State.....	48 Ind., 31..... 390
Martin, People v.....	1 Park Cr., 196..... 244
Martin, State v.....	30 Wis., 216.....8, 413
Martin v. State.....	12 Mo., 474..... 219
Marvin v. State.....	19 Ind., 181..... 169
Marvin, State v.....	35 N. H., 22..... 525
Maab, Com. v.....	7 Metc., 473, 165, 611
Mason v. State.....	42 Ala., 583..... 518
Mayers, Reg. v.....	12 Cox Cr., 311..... 586
Mayloy, Com. v.....	57 Pa. St., 291..... 606
Mead, King v.....	2 Barn. & C., 605..... 4
Medlicott, State v. ...	9 Kas., 237, 263, 280, 424
Mercer, State v.....	32 Iowa, 405..... 390
Mercer, Reg. v.....	6 Jur., 243..... 177
Mercien v. People ex rel., etc.....	25 Wend., 64..... 294
Merriam, Com. v.....	14 Pick., 518..... 525
Merrick, State v.....	19 Me., 398..... 375
Merrifield, Com. v.....	4 Metc., 468..... 115
Merrill, People v.....	4 Kernan, 74..... 504
Miller, People v.....	2 Park Cr., 197..... 238
Miller, State v.....	7 N. C., 73..... 488
Miller v. State.....	25 Wis., 384.....4, 121
Mills v. Com.....	1 Harris, 631..... 9
Miner, State v.....	17 Kas., 208..... 12
Minnock, Rex v.....	1 Crawford and D. Cr., 45..... 269
Minus v. State.....	16 Ohio St., 231..... 253
Mitchell, Ex parte.....	1 La. Ann., 413..... 227
Mogg, Rex v.....	4 C. and P., 364, 520
Moore v. Illinois.....	14 How., 13..... 53
Montgomery, People v., 13 Abb. Prac., N. S., 307.....	191
Morey, State v.....	2 Wis., 494..... 64
Morgan, Com. v.....	107 Mass., 199..... 60
Morres, Rex v.....	7 C. and P., 270, 305
Morrill, Com. v.....	8 Cush., 571..... 43
Morris v. State.....	8 Sm. and M., 862..... 505
Morris v. State.....	31 Ind., 189..... 601
Morris v. State.....	1 Blackf., 37..... 638
Morris, U. S. v.....	1 Curtis C. C., 23, 51
Morrisey v. People.....	11 Mich., 337, 337, 335
Mount v. State.....	14 Ohio, 255..... 436
Mullen, Com. v.....	97 Mass., 545..... 60
Murray v. Com.....	28 P. F. Smith, 817..... 296
Murphy, Com. v.....	2 Gray, 510..... 410
Murphy, State v.....	6 Ala., 340..... 343

	PAGE.
Murphy v. Com.....	1 Metc. (Ky.), 465..... 623
Murtagh, Com. v.....	1 Ashm., 272.... 17
N.	
Nabors v. State.....	6 Ala., 200..... 505
Newcomb v. State	37 Miss., 383..... 326
Newman, People v.....	5 Hill, 296..... 233
Nichols, Com. v.....	10 Metc., 259..... 409
Nisbitt, Reg. v.....	6 Cox Cr., 320... 523
Norton, Com. v.....	11 Allen, 266, 36, 106
Norvill, State v.....	2 Yerg., 24..... 423
Noyes, State v.....	25 Vt., 415..... 37

O.

Oates, Rex v.....	29 Eng. L. and E. 552.... 36
Ober, State v.....	52 N. H., 459..... 60
O'Brien, Com. v.....	119 Mass., 342..... 671
O'Connor, In re.....	6 Wis., 288..... 245
O'Connor v. State.....	9 Fla., 215..... 263
Oddy, Reg. v.....	4 Cox, Cr..... 548
Odell v. State.....	24 Ind., 543..... 25
Oilkill, State v.....	7 Ired., 251..... 470
O'Neale v. Com.....	17 Gratt., 559..... 17
Orbell, Queen v.....	6 Md., 42..... 37
Orkins, State v.....	28 Ind., 364..... 169
Osborne v. People....	2 Park. Cr., 533, 523
Oscar, State v.....	7 Jones, 305..... 483
Owens, State v.....	22 Minn., 233..... 622

P.

Page, Ex parte.....	49 Mo., 291..... 290
Palmer v. People.....	4 Neb., 75..... 426
Parker, Com. v.....	9 Metc., 263..... 4
Parker, Com. v.....	Thach, Cr., 24, 243
Parker v. State.....	4 Ohio St., 563... 409
Parr, Com. v.....	5 Watts and S. 345.... 364
Parsons v. State.....	21 Ala., 300..... 269
Paxton's Case.....	10 L. O. Jur., 212, 213
Pence, U. S. v.....	4 Cranch, 601... 55
Pennington, Ex parte, 18 Mees. and N., 673.....	227
Perkins, In re.....	2 Cal., 434..... 237
Perry, In re.....	80 Wis., 308..... 345
Philbrick, State v.....	31 Me., 401..... 57
Phillips v. People.....	37 Barb., 353..... 523
Pierce, State v.....	8 Iowa, 231, 142, 151
Pierce v. State.....	18 N. H., 536..... 51
Pike, State v.....	49 N. H., 399..... 537
Pleasant v. State.....	13 Ark., 360..... 559
Plunkett, State v.	54 Me., 534..... 526

Polson, Stat.....	
Porter, Com.....	
Porter v. Sta.....	
Potter, State.....	
Powell v. Sta.....	
Prescott, Sta.....	
Price, Com.....	
Price v. Sta.....	
Prism, Com.....	
Prowes, Rex.....	
Pullen v. Pe.....	

Putnam, Co.....	
-----------------	--

Rankin, Stat.....	
Ranney v. P.....	
Rathbun, Pe.....	
Ratzky v. Pe.....	
Ray, Com. v.....	
Reed v. State.....	
Reinhart, Pe.....	
Remby, Com.....	
Rensen v. P.....	
Renton, Stat.....	
Restenblatt,	
Rew, Rex v.....	
Rew v. Missa.....	
Rey v. State.....	
Reynolds, Co.....	
Reynolds v.....	
Rhodes, Reg.....	
Rheons v. Co.....	
Richards, Pe.....	
Richardson,	
Riley, U. S. v.....	
Rindskopf's	
Ring, In re.....	
Ripley, State.....	
Robbins v. S.....	
Roberts, Sta.....	
Roberts v. S.....	
Robinson, P.....	
Robson, Rex.....	
Roby, Com.....	
Rodabaugh, S.....	
Roder, Rex.....	
Roelker, In.....	
Rolland v. C.....	
Ross, State.....	
Roswell, Sta.....	
Roudenbush.....	
Rounalls, St.....	

TABLE OF CASES CITED.

xi

	PAGE.
Polson, State v.....	29 Iowa, 133..... 629
Porter, Com. v.....	10 Mete., 263..... 50
Porter v. State.....	15 Ind., 433..... 140
Potter, State v.....	28 Iowa, 554..... 36
Powell v. State.....	19 Ala., 577..... 336
Prescott, State v.....	33 N. H., 212..... 582
Price, Com. v.....	10 Gray, 472..... 523
Price v. State.....	19 Ohio, 423..... 429
Prus, Com. v.....	9 Gray, 127..... 36
Prowes, Rex v.....	1 Moo. Cr., 349..... 353
Pullen v. People.....	1 Doug. (Mich.), 48..... 337
Putnam, Com. v.....	1 Pick., 136..... 612

R

Rankin, State v.....	4 Coldw., 146..... 56
Ranney v. People.....	22 N. Y., 413..... 243
Rathbun, People v.....	21 Wend., 509..... 38
Ratzky v. People.....	29 N. Y., 134..... 404
Ray, Com. v.....	3 Gray, 448..... 144
Reed v. State.....	28 Ind., 396..... 144
Reinhart, People v.....	39 Cal., 449..... 61
Remby, Com. v.....	2 Gray, 508..... 410
Remsen v. People.....	43 N. Y., 6..... 22
Renton, State v.....	15 N. H., 169..... 550
Restenblatt, People v.....	1 Abb. Pr., 208..... 132
Rew, Rex v.....	1 Kel., 26..... 298
Rew v. Missouri.....	17 Wall., 532..... 394
Rey v. State.....	1 Iowa, 316..... 457
Reynolds, Com. v.....	114 Mass., 306..... 409
Reynolds v. U. S.....	8 Otto, 145..... 284, 611
Rhodes, Reg. v.....	2 Lord Rags., 886, 420
Rhouns v. Com.....	2 Duvall, 159..... 341
Richards, People v.....	1 Mich., 217..... 37
Richardson, Reg. v.....	2 F. and F., 343, 521
Riley, U. S. v.....	5 Blatchf., 204..... 51
Rindskop's Case.....	34 Wis., 217..... 123
King, In re.....	28 Cal., 347..... 227
Ripley, State v.....	31 Me., 380..... 87
Robbins v. State.....	8 Ohio St., 114..... 88
Roberts, State v.....	34 Me., 328..... 86
Roberts v. State.....	14 Geo., 12..... 861
Robinson, People v.....	1 Park Cr., 644..... 529
Robson, Rex v.....	R. and R., 413, 348
Roby, Com. v.....	12 Pick., 502..... 53, 429
Roelbach, State v.....	19 Iowa, 154..... 605
Roder, Rex v.....	13 Cox Cr., 630..... 519
Roelker, In re.....	Sprague, 276..... 191
Rolland v. Com.....	82 Pa. St., 306..... 62
Ross, State v.....	20 Mo., 32..... 337
Roswell, State v.....	6 Conn., 416..... 17
Roudenbush, U. S. v.....	1 Bald., 514..... 21
Rounalls, State v.....	14 La. Ann., 273, 353

Rowton, Reg. v.....	2 B. and H., 333, 63
Russell v. Com.....	P. and W., 83, 227

S

Sallenville, Com v.....	120 Mass., 385..... 416
Salt, Reg. v.....	3 F. and F., 834, 523
Sam's Case.....	13 S. and M., 189, 456
Sater, State v.....	8 Iowa, 420..... 263
Saunders, People v.....	4 Park. Cr., 196, 55
Scales, State v.....	5 Jones, 115..... 273
Schenck, People v.....	2 Johns., 479..... 353
Schmidt v. State.....	14 Mo., 137..... 409
Schriedley v. State.....	23 Ohio St., 130..... 84
Scott, State v.....	12 La. Ann., 274, 290
Seals, State v.....	16 Ind., 352..... 17
Seibert v. State.....	40 Ala., 60..... 410
Selfridge, Com. v..... 259
Shaffner v. Com.....	22 P. F. Smith, 60..... 305, 540
Shall, People v.....	9 Cow., 778..... 144
Shannon v. People.....	5 Mich., 71..... 76
Shedd, Com. v.....	7 Cush., 514..... 36
Shepard, State v.....	7 Conn., 54..... 633
Shepherd, Com. v.....	1 Allen, 575..... 531
Shepherd, State v.....	7 Conn., 54..... 54, 585
Sheppard's Case.....	Leach Cr., 205, 151
Simmons v. Com.....	5 Blinn., 617..... 353
Simpson, Com. v.....	9 Mete., 13..... 115
Simpson, State v.....	3 Hawks., 620..... 36
Simpson v. State.....	4 Humph., 458..... 353
Skiff, People v.....	2 Park. Cr., 140, 57, 101
Slaughter v. State.....	6 Humph., 412..... 434
Smaltory v. State.....	46 Ind., 447..... 375
Smart, Com. v.....	6 Gray, 15..... 115
Smith, Com. v.....	1 Gratt., 553..... 478
Smith, Com. v.....	103 Mass., 144..... 390
Smith, People ex rel.....	22 N. Y., Sup. Ct., 414..... 175
Smith, People v.....	25 Mich., 497..... 132
Smith, People v.....	53 N. Y., 111..... 346
Smith, State v.....	8 Yerg., 151..... 149
Smith, State v.....	75 N. C., 306..... 317
Smith v. State.....	33 Me., 48..... 4
Smith v. State.....	18 Ohio St., 420..... 156
Smith, People v.....	9 Mich., 193..... 629
Spangler, In re.....	11 Mich., 310..... 244
Speiger v. State.....	32 Wis., 400..... 606
Spillsbury, Rex v.....	7 C. and P., 187, 323
Squire v. State.....	46 Ind., 459..... 611
Stacy, In re.....	10 Johns., 393..... 244
Stafford, State v.....	37 Me., 135..... 377
Stanberry, Reg. v.....	9 Cox Cr., 94..... 89
Stanly, State v.....	4 Jones, 200..... 54
Stannard, Rex v.....	7 C. and P., 673, 32

AMERICAN CRIMINAL REPORTS.

	PAGE.
Staup v. Com.....	74 Pa. St., 458..... 269
Stearns, People v.....	21 Wend., 413..... 144
Stearns, Com v.....	2 Metc., 343..... 108
	121
Stearns, Com v.....	10 Metc., 256..... 518
Stedman, State v.....	7 Port., 495..... 471
Stephens v. State.....	11 Geo., 238..... 590
Stephenson, Com. v.....	11 Cush., 481..... 151
Stetson, People v.....	4 Barb., 151.. 36, 87
Stevens, State v.....	20 Iowa, 391..... 36
Stephens, Reg. v.....	L. Rep., 1 Q. B., 703..... 646
Stewart v. State.....	24 Ind., 142..... 133
Stewart v. State.....	18 Ark., 747..... 431
Stewart v. State.....	5 Ohio St., 241.. 447
Stinson v. People.....	43 Ill., 397..... 115
Stoehr, Com. v.....	109 Mass., 365..... 525
Stokes v. People.....	53 N. Y., 164.. 262, 326
Stoltz's Case.....	4 Scam., 168..... 505
Stout, People v.....	4 Park. Cr., 71.. 519
Stoner v. People.....	56 N. Y., 315..... 22
Strain, Com. v.....	10 Metc., 521..... 87
Strong's Case.....	Kirby, 345..... 99
Stubbs, Reg. v.....	Dears. Cr., 555, 307
Sullivan, State v.....	45 Wis., 595..... 633
Sully, People v.....	5 Park. Cr., 142, 98 107, 238
Summers, Rex v.....	3 Salk., 194..... 98
Swink, State v.....	4 D. and B., 358, 138
T.	
Taintor, U. S. v.....	11 Blatchf., 374.. 122
Taylor, Com. v.....	104 Mass., 172..... 88
Terrel, State v.....	12 Rich., 329.. 7, 281
Thomas, People v.....	9 Mich., 221..... 61
Thomas, Reg. v.....	0 C. and P., 741, 348
Thomas v. People.....	34 N. Y., 351..... 238
Thompson, Com. v.....	6 Allen, 591..... 615
Thompson, State v.....	19 Iowa, 296..... 151
Thompson v. Com.....	1 Metc. (Ky.), 13, 337
Thompson v. State.....	5 Humph., 138.. 409
Thornton, State v.....	37 Mo., 380..... 54
Thrasher, Com. v.....	11 Gray, 450.. 60, 525
Thurborn, Reg. v.....	1 Den. Cr., 287.. 338
Thurston, State v.....	2 McM. (S. C.), 382..... 359
Tilton, People v.....	2 Wheeler Cr., 251..... 65
Tompkins, People v.....	1 Park. Cr., 234, 237
Toney, Ex parte.....	11 Mo., 602..... 324
Townsend, State v.....	2 Harr. (Del.), 543..... 55
Tritice, Reg. v.....	1 C. and M., 650, 277
Trits, Com. v.....	4 Pa. L. Rep., 43, 607

	PAGE.
Tryon, People v.....	4 Mich., 665..... 115
Tuckerman, Com. v.....	10 Gray, 173..... 521
Turbeville v. State.....	42 Ind., 490..... 375
Turner, Com. v.....	3 Metc., 19..... 524
Turner, Rex v.....	9 Cox Cr., 145.. 608
Tweedy, State v.....	11 Iowa, 351..... 437
Tyra v. Com.....	2 Metc. (Ky.), 1, 628

U.

Underwood, State v.....	49 Me., 181..... 350
Uppichard, Com. v.....	3 Gray, 434..... 353

V.

Vadnais, State v.....	21 Minn., 382..... 622
Vickery v. State.....	19 Tex., 326..... 102
Voke, Reg. v.....	R. and R., 531, 519
Von Earnam's Case.....	4 N. C. Rep., 228, 213

W.

Wade, Com. v.....	12 Pick., 496..... 53
Wade, U. S. v.....	2 Cranch, 680.. 336
Walker v. State.....	6 Blackf., 1..... 607
Wall, State v.....	34 Me., 165..... 391
Wall v. State.....	23 Ind., 150..... 189
Wall v. State.....	51 Ind., 453..... 320
Wallace, Com. v.....	16 Gray, 221..... 36
Wallace, State v.....	9 N. H., 515.. 172, 525
Walter, State v.....	14 Kas., 375..... 419
Walter, Rex v.....	3 Esp., 21..... 644
Warden v. State.....	24 Ohio St., 143.. 156
Warner, People v.....	5 Wend., 271.. 429
Watkins, State v.....	9 Conn., 47..... 519
Watkins v. State.....	14 Ind., 412..... 403
Watson v. State.....	36 Miss., 393..... 350
Way v. State.....	35 Ind., 409..... 375
Weatherby, State v.....	43 Me., 258..... 617
Webster, Com. v.....	5 Cush., 295..... 293
	548
Well, People v.....	40 Cal., 208..... 293
Weinzorpfm v. State.....	7 Blackf., 180.. 505
Weich v. People.....	17 Ill., 399..... 98, 115
Wells, Rex v.....	M. and M., 329, 305
Wentworth, State v.....	65 Me., 234..... 60
Wentworth, State v.....	35 N. H., 442.. 410, 582
West v. State.....	1 Wis., 209..... 17, 75
Weymouth, Com. v.....	2 Allen, 144..... 505
Whaley, Com. v.....	6 Bush, 260..... 163
Wheatland, Reg. v.....	8 C. and P., 238, 413
Wheeler, State v.....	19 Minn., 68..... 144
White, Com. v.....	11 Cush., 481..... 153
White, People v.....	24 Wend., 580.. 470
White v. State.....	51 Geo., 885..... 32
Whitten v. State.....	36 Ind., 106..... 123

Wilkes, Rex v.
Williams, Com.
Williams, Com.
Williams, Peo.
Williams, Rex
Williams, Stat.
Williams v. Co.
Williams v. St.
Williams v. St.
Williams v. St.
Wilson, Com.
Wilson, State
Wilson v. Sta.
Wilson v. Stat.
Wilson v. Stat.
Wilson, People
Wininger v. St.
Winkworth, R.
Winslow, Peop.
Wolferton v. S.
Wood, People
Wood, Reg. v.
Wood, State v.
Woods, Com.

TABLE OF CASES CITED.

xiii

	PAGE.		PAGE.
Wilkes, Rex v.....	7 C. and P., 271, 305	Workman v. State....	4 Sneed., 425.... 337
Williams, Com. v.....	9 Gray, 461.... 114	Wright v. People.....	1 Breese, 66.... 147
Williams, Com. v.....	2 Ashm., 69.... 321	Wright v. State.....	18 Geo., 383.... 263
Williams, People v....	4 Hill, 9.... 36	Wylie, Rex v.....	2 Leach Cr., 973, 529
Williams, Rex v.....	1 C. and K., 195, 111	Wyman, Com. v.....	8 Mete., 247.... 115
Williams, State v.....	10 Humph., 101.. 359		
Williams v. Com.....	5 Casey, 102.... 306		
Williams v. State.....	19 Geo., 402.... 284		
Williams v. State.....	8 Humph., 585.. 526		
Williams v. State.....	12 Ohio St., 622.. 629		
Wilson, Com. v.....	1 Gray, 340.... 305		
Wilson, State v.....	23 La. Ann., 558, 281		
Wilson v. State.....	1 Wis., 184.... 5		
Wilson v. State.....	24 Conn., 57.... 53		
Wilson v. State.....	1 Porter, 118... 98		
Wilson, People v.....	64 Ill., 195.... 650		
Wininger v. State.....	13 Ind., 540.... 55		
Winkworth, Reg. v....	4 C. and P., 444, 521		
Winslow, People v....	88 Mich. 242		
Wolferton v. State....	16 Ohio, 173.... 17		
Wood, People v.....	3 Park. Cr., 681, 581		
Wood, Reg. v.....	3 Cox Cr., 453.. 333		
Wood, State v.....	38 Wis., 71.... 245		
Woods, Com. v.....	10 Gray, 477.... 133		

Y.

Yandt v. People.	65 Ill., 373.... 481
Yancy, State v.	1 Law Rep. (N. C.), 519.... 55
Yates, Ex parte.....	4 Johns., 318... 220
Yager, Ex parte.....	8 Hall, 85.... 241
Yoe v. People.....	49 Ill., 410.... 482
York, Com. v.....	9 Mete., 93.... 548
Young, Com. v.....	9 Gray, 5.... 114
Young, Rex v.....	3 Term, 98... 37, 240
Young, State v.....	76 N. C., 258.... 106
Young's Case.....	15 Gratt., 604.... 477

Z.

Zweigle v. State.....	27 Wis., 896.... 606
-----------------------	----------------------

C

AMERICAN
CRIMINAL REPORTS.

CR

ABORTIO

state

dece

law

In a crim

ister

destr

befo

of co

the

mad

only

dece

ally

Held, th

and

and

there

In prosec

son v

stanc

claus

" me

At the co

nant

aborn

reduc

REPO

The

by Mr.

" On

the opin

Vo

AMERICAN CRIMINAL REPORTS.

STATE v. DICKINSON.

(41 Wis., 299.)

ABORTION: *Producing death of pregnant woman by drugs, etc.—Proof of statements of deceased when visiting defendant—Dying declaration of deceased when about to visit defendant—Nature of the offense at common law and by statute.*

In a criminal action for producing the death of a pregnant woman by administering drugs or using an instrument upon her for the purpose of destroying the child, where it was shown that the deceased, shortly before her death, visited defendant's house, the court admitted evidence of conversations between the deceased and the witness, occurring about the time of such visits, in relation to the object for which they were made, but instructed the jury that they could consider such testimony only as it tended to show the purpose or intention with which the deceased visited the defendant, and not as evidence that defendant actually performed the acts charged.

Held, that there was no error; proof of such visits being clearly admissible, and the other facts testified to being contemporaneous with the visits, and so connected with them as to illustrate their character, and being therefore a part of the *res geste*.

In prosecutions for any form of homicide, the dying declarations of the person whose death is the subject of the charge, in respect to the circumstances of the death, are admissible in evidence, notwithstanding the clause in the bill of rights which secures to the accused the right to "meet the witnesses face to face."

At the common law, the unlawful use of instruments or drugs upon a pregnant woman, though with her consent, for the purpose of producing an abortion, if it resulted in her death, was murder; while the statute reduces the crime to manslaughter in the second degree.

REPORTED from the circuit court for Green county.

The following statement of the case was originally prepared by Mr. Justice COLE as a part of his opinion:

"On the trial of this cause, questions of law arose, which, in the opinion of the circuit judge, were so important and doubtful

as to require the decision of the Supreme Court upon them; and, the defendant desiring it, those questions have been reported by the judge for the decision of this court.

"This was a criminal information founded upon section 11, ch. 164 R. S., which reads as follows: 'Every person who shall administer to any woman pregnant with child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of said mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.' The information in this case charges, in substance, that the defendant did, on the 8th day of January, 1876, at, etc., in and upon one Jenny Everson then and there being—the said Jenny Everson being pregnant with child—feloniously and willfully make an assault, and that the defendant did then and there feloniously and willfully employ upon the body and womb of said Jenny a certain sharp instrument, to the informant unknown, with intent thereby then and there feloniously and willfully to destroy said child, the same not being necessary, etc., and not being advised, etc.; by means whereof the death of the said Jenny was thereby, to wit, on the 16th day of January, 1876, at, etc., produced, whereby the defendant did, on the said 16th day of January, at, etc., feloniously kill and slay the said Jenny Everson against the peace and dignity of the state.

"The circuit judge reports that, on the trial, it appeared by the uncontradicted testimony, that the defendant had been in the practice of treating diseases for several years prior to the commission of the offense for which she was tried; that during this time she was a resident of the village of Monroe, and was familiarly known as Mrs. Ferguson, and was so called, though her real name is *Dickinson*; that deceased, at the time of her death and for a year or more next prior thereto, resided in the Gleissner House, a public hotel in the village, as a servant; that the residence of the defendant was about one-half mile south therefrom; that while deceased was so living at the Gleissner House, one Mary Erickson was also a servant in the same house, residing therein; was an intimate friend of deceased, and shared the same room and bed, they being of about the same age; that

Mary v
of Jan
away fr
prosecu
being s
Gleissn
of havi
among
loaning
decease
said she
afternoon
mitted t
previous
decease
conversa
found o
see the
ant to
arrangem
performe
defendan
instrume
of the te
ments of
part of t
purpose.
petent to
of having
duced fo
so restric
that all
informed
connected
that at th
the defe
not evide
or had en
"The
lowing:
"1.

Mary was with deceased at the Gleissner House on the 8th day of January, 1876, until about three o'clock p. m., when she went away from the house, leaving deceased in her room therein. The prosecution sought to prove that on the 8th day of January, being Saturday, the deceased, in the afternoon, went from the Gleissner House to the house of the defendant for the purpose of having an operation for abortion performed upon her, and, among other witnesses, called Mary Erickson, who testified to loaning deceased \$10 that day, and as to conversations had with deceased when she loaned the money; stated what the deceased said she was going to do with it, and where she was going that afternoon, and for what purpose. The witness was also permitted to testify as to conversations had with the deceased on the previous Wednesday and Friday, either before or after the deceased had been out and had returned to the hotel. In these conversations the deceased stated that she understood or had found out that she was in a family way; that she had been to see the defendant about it; had been or was going to defendant to get medicine and syringe; that she had made an arrangement or bargain with defendant to have an operation performed upon her; was to give \$25, and was to return to defendant's on Saturday afternoon for the purpose of having instruments used to get rid of the child. This is the substance of the testimony of this witness as to the declarations or statements of the deceased. The testimony was objected to on the part of the defendant as incompetent and inadmissible for any purpose. The prosecution, however, claimed that it was competent to show that the deceased had at that time the intention of having an abortion produced, and that this evidence was introduced for that purpose. In his charge, the learned circuit judge so restricted the effect of the testimony, and directed the jury that all the declarations of the deceased made before she was informed she could not live, in which the defendant's name was connected, could only be considered as evidence tending to show that at that time the deceased had formed the purpose to go to the defendant to have an abortion produced upon her, but was not evidence that the defendant actually produced the abortion or had engaged to do it.

"The questions submitted by the circuit judge are the following:

"1. Did the circuit court err in admitting the testimony of

the witness Mary Erickson in respect to the statements sworn to have been made to her by the deceased, Jenny Everson, as set forth in the report, as the scope and effect of the same were restricted in the instructions given to the jury?

"2. Did the circuit court err in admitting in evidence the instrument containing the dying declarations of the deceased, Jenny Everson?"

The cause was argued for the defendant by *B. Dunwiddie*, her attorney, and *S. U. Pinney*, of counsel; and for the state by the *Attorney-General*.

For the defense it was contended: 1. That the dying declarations of the deceased were not admissible in evidence. The rule is, that such evidence is admissible only "when the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations." *The King v. Mead*, 2 Barn. and Cress., 605 and note; *State v. Cameron*, 2 Pin., 495; *Miller v. State*, 25 Wis., 388; *Regina v. Hind*, 8 Cox, 300. In the last case cited, it is said that "the reception of this kind of evidence is clearly an anomalous exception in the law of England, which ought not to be extended." See also 11 Cl. and Fin., 108, 112.

This kind of evidence is not regarded with favor, and no case like the present can be found where it has been adjudged admissible. The remarks of Redfield, J., in *State v. Howard*, 32 Vt., 380, are mere *dicta*. Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination; all these considerations conspire to render such declarations a dangerous kind of evidence. The rule of evidence is of common law origin, and applied and still applies only to cases of *felonious homicide at common law*. The procuring or attempting to procure a miscarriage or abortion was not an offense at common law, if the pregnant woman was not *quick* with child, and consented to the act: *State v. Cooper*, 2 Zab., 52; *Smith v. State*, 33 Me., 48; *Comm. v. Parker*, 9 Met., 263; 8 Mass., 388. The statute under which this information was brought, is not in affirmance of the common law, for, under it, it is not material whether the pregnant woman was *quick* with child. Our statutes declare cer-

tain ac
which
and the
icides.
slaught
admitti
term "
cable to
law rul
The Sto
taken b
prevails
of the i
was a m
killing
death, w
be mure
manslan
brought
jects of
the main
and 3);
curing a
with int
mother
excluded
decisive
ch. 181
declares
procurin
act, wou
mon law
In the
of it, we
case at
and in
this me
was the
child be
being th
differenc

tain acts or omissions resulting in death, felonious homicides, which were not such at common law (R. S., ch. 164, secs. 16-19); and the offense here in question is one of these statutory homicides. But the mere characterization of the offense as manslaughter by the statute does not bring the case within the rule admitting dying declarations, just as the statute defining the term "felony," when used in any statute, does not render applicable to every act falling within such definition those common law rules which were applicable only to felonies: *Wilson v. The State*, 1 Wis., 184. In criminal matters, nothing is to be taken by intendment, but the utmost strictness of construction prevails in favor of liberty and life. It is true that the mere use of the instrument on a pregnant woman, with the intent charged, was a misdemeanor, under section 58, ch. 169, R. S.; and that the killing of the deceased by such act, without a design to effect death, while engaged in perpetrating such misdemeanor, would be murder at the common law, mitigated by section 8, ch. 164, to manslaughter in the first degree; but this information is not brought under that section. The New York statutes on the subjects of murder and manslaughter and criminal abortion are in the main like ours (see Laws of N. Y. 1872, ch. 181, sections 1 and 3); and in the case of an indictment for advising and procuring a pregnant woman to submit to the use of an instrument with intent to cause a miscarriage, resulting in the death of the mother and child, the dying declarations of the mother were excluded: *People v. Davis*, 56 N. Y., 103. That case seems decisive of this. The offense there charged was under section 1, ch. 181 of the laws of New York of 1872, which expressly declares it to be a *felony*; hence the killing of the deceased by procuring her to resort to means criminal under section 3 of that act, would be felonious killing, and would be murder at the common law, or manslaughter under a statute like ours.

In that case the death of the deceased, and the circumstances of it, were the subject of the charge in the same sense as in the case at bar. In both, the substantive act was a misdemeanor, and in both the death of the mother was a consequence, and this merely increased the punishment; and in neither case was the death of the mother essential to the offense, that of the child being sufficient. The essential elements of the offense being the same under the two statutes, it can make no possible difference that our statute characterizes the offense as man-

slaughter, while the New York statute does not. The argument drawn from supposed necessity cannot be allowed to prevail, although that was the foundation of the rule. While valid to the extent of the rule at common law, this argument will not suffice to extend it: *Reo v. Mead*, *Regina v. Hind*, and *People v. Davis*, *supra*. 2. That the declarations of Jenny Everson to Mary Erickson were improperly admitted in evidence. Such declarations are not admissible for any purpose, unless the principal act which they accompany, and to which they relate, was itself *material to the issue*, nor unless made at the time when the principal act was done, nor unless they were of a character to explain its true nature: *Enos v. Tuttle*, 3 Conn., 250; *Noyes v. Ward*, 19 Id., 269; *Corinth v. Lincoln*, 34 Me., 312; *Moore v. Meacham*, 10 N. Y., 210. Whether Jenny was or was not a consenting party to the alleged attempt at abortion, or "had formed the purpose to go to the defendant to have an abortion performed upon her," was not material to the issue: *Frink v. Coe*, 4 G. Greene, 556; *Bacon v. Charlton*, 7 Cush., 586; *Lund v. Tyngsborough*, 9 Id., 41; *Chapin v. Marlborough*, 9 Gray, 244; 1 Tayl. Ev., §§ 523-4. Some of these statements, relating to what *had* occurred at defendant's house between the deceased and defendant, being a mere narration of *past* occurrences, were clearly inadmissible (1 Tayl. Ev., § 526; *Nutting v. Page*, 4 Gray, 584; *People v. Davis*, 56 N. Y., 101, 102); yet they were calculated to impress a jury strongly against defendant, notwithstanding the charge of the judge attempting to restrict the use of the evidence; and this is sufficient ground for a new trial: *Lain v. Shepardson*, 23 Wis., 224; *Posey v. Rice*, 29 Id., 93.

For the state it was contended, 1. That the dying declarations of the person whose death is alleged to have been caused by defendant were properly admitted. The offense defined in the statute under which defendant was convicted consists in the killing of a human being. By Tay. Stats., 1889, § 57, the using of an instrument with intent to produce miscarriage is a misdemeanor; the death of any person being no part of the offense. Dying declarations are admitted mainly on the ground of necessity (1 Greenl. Ev., Redf. Ed., note 2 to § 156), and partly on the ground that the certainty and near approach of death create an obligation equal to that imposed by an oath in a court of justice: 1 Greenl. Ev., § 156, and note. These reasons apply quite as strongly to this case as to other cases of homicide. The

rule is,
"where
and the
declarat
Reo v. 1
329. I
mother
and the
slaughte
Abort.,
decision
charged
which th
whether
of drugs
murder
Storer an

COLE,
deceased
showing
restricted
They cor
with the
with it
was certa
house of
mation t
intent or
tions thu
became
tions we
were ex
duct, and
present
proof lik
Insuran
247; *In*
310; *Lu*
36; *Nu*
380; *Me*

rule is, that such declarations are admissible in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." The present case is strictly within the rule. See *Rex v. Baker*, 2 Moody and Rob., 53; *State v. Terrell*, 12 Rich., 329. In the English cases cited for the defense, the death of the mother was not made by the statute an ingredient of the crime, and the crime itself was only declared a felony and not manslaughter. See the statutes in *Storer and Heard on Crim. Abort.*, 165, *et seq.* In *People v. Davis*, 56 N. Y., 95, the decision is put expressly upon the ground that the offense charged was not homicide in any degree. The principle upon which the rule of evidence rests, applies to all cases of homicide, whether at common law or by statute. But the administering of drugs or use of instruments to produce abortions was always murder at common law, when the death of the mother followed: *Storer and Heard*, 159, *et seq.*

COLE, J. The first inquiry is, whether the declarations of deceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court. We are of opinion that they were. They constituted a part of the *res gestæ*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character: 1 Greenl. Ev., § 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations thus made, or previously made; because such declarations became a part of the *res gestæ*. For it is evident the declarations were connected with the act of her going to the defendant; were expressive of the character, motive or object of her conduct, and they are to be regarded "as verbal acts indicating a present purpose or intention, and, therefore, are admitted in proof like any other material facts:" 1 Greenl. Ev., *supra*; *Insurance Co. v. Mosley*, 8 Wall., 397; *Enos v. Tuttle*, 3 Conn., 247; *Inhabitants of Corinth v. Inhabitants of Lincoln*, 34 Me., 310; *Lund and Wife v. Inhabitants of Tyngsborough*, 9 Cush., 36; *Nutting v. Paige*, 4 Gray, 581; *State v. Howard*, 32 Vt., 380; *Moore v. Meacham*, 10 N. Y., 207; *People v. Davis*, 56

Id., 96. It is obvious that the mere act of the deceased going to defendant's house was equivocal; it might be innocent or not; it might warrant the inference that she went for proper treatment of some ailment; the declarations would render her motive clear and intelligible. They, therefore, seem to us as falling under the denomination of the *res gestæ*, and were admissible as original evidence as distinguished from hearsay.

In *State v. Howard, supra*, the declarations of the deceased, Olive Ashe, as to the purpose of the journey in going to the defendant's, were held by the court to be admissible as part of the *res gestæ*. Upon this question, Redfield, C. J., observes, that "the mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act." In *People v. Davis*, when the deceased came home, in answer to inquiries from her step-mother, she made statements telling what had been done to her by Dr. Crandall at his office, and how he did it, exhibiting certain medicine which she said the doctor gave her, and stated what he told her as to taking it when her pains came on. The court held these declarations incompetent because they were merely narratives of past occurrences, did not become a part of the thing done at the doctor's office, and were, therefore, no part of the *res gestæ*. But the court say: "Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible" (p. 103). The conclusion which we have reached in view of all the cases upon the subject, is, that the declarations of the deceased made to the witness Mary Erickson were so connected with her act of going to the defendant's as to constitute a part of that act, and were admissible as explanatory of that act. See *Regina v. Edwards*, 12 Cox Cr. Law Cas., 230.

The second question relates to the admissibility of the instrument containing the dying declarations of the deceased. It is insisted on the part of the defendant that these declarations were not competent evidence against the accused. The question has in effect been decided adversely to this view by this court. In *Miller v. The State*, 25 Wis., 384, and *The State v. Martin*, 30 Id., 216, it was held that dying declarations were competent evidence, notwithstanding the clause in the bill of rights which secures to the accused in criminal prosecutions the right "to

meet the
did not c
was adop
cases of
ject of t
subject o
cases wer
of the de
this is an
second de
Everson
her death
tions com
cases.

But it
miscarria
pregnant
act. The
view. (S
The State
State v. O
1 Harris,
inal offen
that unde
pregnant
offense th
nant with
means wit
the death
"The use
monwealt
miscarria
by such v
law. So
the death
attempt, v
the murde
without la
of the we
more than
sent of tl

meet the witnesses face to face." It was said that this provision did not exclude such declarations, because when the constitution was adopted it was well settled that they were admissible in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." It is true that both these cases were indictments for murder; but the reason and principle of the decisions are strictly applicable to the case at bar. For this is an information for homicide, for manslaughter in the second degree, and it is very apparent that the death of Jenny Everson is the subject of the charge, and the circumstances of her death are the subject of the dying declarations. The declarations come, therefore, directly within the rule of the adjudged cases.

But it is said that the procuring or attempting to procure a miscarriage or abortion was not an offense at common law, if the pregnant woman was not *quick* with child and consented to the act. There are most respectable authorities in support of that view. (See *Commonwealth v. Bangs*, 9 Mass., 387; *Smith v. The State*, 33 Me., 48; *Commonwealth v. Parker*, 9 Met., 263; *State v. Cooper*, 2 Zab., 52; *contra*, *Mills v. The Commonwealth*, 1 Harris, Pa., 631, 634.) Our statute makes such an act a criminal offense. Sec. 58, ch. 169, R. S. It will also be remarked that under section 11, ch. 164, it is not material whether the pregnant woman be *quick* with child or not. The statutory offense there described consists in administering to a woman pregnant with child any drug, or in using any instrumental or other means with intent thereby to destroy the child, unless, etc., when the death of such child or of such mother is thereby produced. "The use of violence upon a woman," says Shaw, C. J., in *Commonwealth v. Parker*, *supra*, "with an intent to procure her miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where in like manner there is consent of the parties" (p. 265). Lord Hale, in his pleas of the

crown, says: "If a woman be with child, and any person gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and, therefore, he that gives a potion to this end must take the hazard, and if it kill the mother it is murder; and so ruled before me at the assizes at Bury, in the year 1670:" 1 Hale, 430. East, treating of the law of homicide with malice aforethought, observes: "Hither also may be referred the case of one who gave medicine to a woman, and that of another who put skewers in her womb, with a view, in each case, to procure an abortion, whereby the women were killed. Such acts are clearly murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practiced:" 1 East's Pleas of the Crown, 230; Russell on Crimes, 540; *Smith v. The State*, *supra*. These authorities show that the offense described in section 11, where the death of the mother ensued from the unlawful act, was murder at common law, and that the statute really reduced the grade of the offense to manslaughter in the second degree. And it is entirely clear that the dying declarations would have been competent evidence at common law, where the death of the deceased, as in this case, was the subject of the charge and judicial inquiry, and the declarations relate to the circumstances of the death. Upon that point, it seems to us there is no room for doubt. The fact that the offense with which the defendant is charged has been mitigated, does not change the rule of evidence. The offense is still homicide, though not murder.

In *State v. Howard* there is an express intimation that the dying declarations of Olive Ashe were admissible under the count for manslaughter; but as the defendant was acquitted on that count, the exclusion of such declarations was decided to be an immaterial question.

In *People v. Davis*, the defendant was charged, under section 1, ch. 181, laws of 1872, with advising and procuring one Clara Perry to submit to the use of an instrument by Dr. Crandall with intent to produce a miscarriage of the said Clara, and the indictment charged that the death of the said Clara, and of her child, was produced by the use of the instrument. But this was

felony b
Court de
case (2 T
of appeal
the prison
ground t
declaratio
rule of e
Barn. and
300, and
King v. I
to the car
the subject
note 2, §
which the
(See the c
Baker, 2
declaratio
full appre
death, and
evidence.

This dis
The cau
county, w
By the

NOTE.—I
the homicid
are ordinari
the object se
and also tha
the evidence
is proper to
act, and exp
kept careful
the same co

In *State*
murder of I
called "the
deceased ri
Bates place
way, and st
objected to
admitted, s
ought not

felony by the statute, and not manslaughter. The Supreme Court decided that the dying declarations were admissible in that case (2 T. and Cook, 212); but this was overruled by the court of appeals. The court of appeals say, that the charge against the prisoner was not homicide in any degree, and upon that ground the declarations were excluded. The admission of the declarations in that case would seem to have been extending the rule of evidence. The same is true of *The King v. Mead*, 2 Barn. and Cress., 605; *Regina v. Hind*, 8 Cox Cr. Law Cas., 300, and *Rex v. Hutchinson*, referred to in note (a) to case of *King v. Mead*. In all these cases, while the declarations related to the cause of the death, yet the death of such party was not the subject of inquiry. These and other cases are referred to in note 2, §156, 1 Greenl. Ev., May's ed., and the grounds upon which the declarations are received as testimony are discussed. (See the cases of *The State v. Terrell*, 12 Rich., 321, and *Rex v. Baker*, 2 Moody and Rob., 53.) There is no doubt that the declarations were made by Jenny Everson *in extremis*, with a full apprehension at the time of the danger she was in and of death, and we, therefore, think they were properly received in evidence.

This disposes of the questions submitted for our decision.

The cause must be certified back to the circuit court of Green county, with this our decision.

By the court. It is so ordered.

NOTE.—In cases of homicide, the declarations of the deceased, made before the homicide, when starting or going to meet the accused, for any purpose, are ordinarily admitted in evidence as part of the *res gestæ*, in order to show the object sought by the meeting, the motives which animated the deceased, and also that the meeting actually occurred. Confined within these limits, the evidence falls strictly within the general rule, that where an act of a party is proper to be proved, the declarations of the party contemporaneous with the act, and explanatory of it, are equally admissible. But the evidence will be kept carefully within these limits, and statements of fact by the deceased, in the same connection, will be rejected as hearsay.

In *State v. Dula*, Phil. Law (N. C.), 211, the accused was tried for the murder of Laura Foster. The body of the deceased was found near a locality called "the Bates place." A witness was allowed to testify that she saw the deceased riding horseback; that deceased told her that she was going to the Bates place; that the prisoner had returned just before day, was going another way, and she expected to meet him at the Bates place. The prisoner having objected to this testimony, the Supreme Court held that it was improperly admitted, saying "the conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it

except that the deceased said she was going to the Bates place. How what the deceased said in regard to the prisoner's having come just before day, and where he was, and where she expected to meet him, can in any sense be considered a part of the acts of the deceased * * * * we are unable to perceive."

In *People v. Carkhuff*, 24 Cal., 640, the respondent was tried for the murder of his uncle. The accused and deceased lived together, and there were no other inmates of the house. The prosecution were allowed to prove by one Burns that on the 29th of December, in the afternoon, deceased told him that the respondent (who had been on a journey) would be home that night. On the morning of the 30th respondent went to Burns's house and told him that his uncle had been murdered. Burns went with respondent to the house, and found the body of deceased lying on the floor, the skull broken and throat cut. The body was cold, and it appeared that the murder must have been committed from seven to ten hours before. The testimony of Burns was admitted for the purpose of showing that respondent was in the house when the murder was committed. This was held to be error, the court saying: "It is impossible to conceive on what theory that declaration was admissible. If the declaration had been made to the witness by any other person it would not be contended that it was admissible in evidence, for evidently it would be obnoxious to the objection that it was hearsay testimony."

In *Kirby v. State*, 9 Yerg. (Tenn.), 383, the respondent was charged with the murder of Peter Elrod, who was found dead with marks of violence upon him, on the pine mountain in White county. A witness for the state was allowed to testify that he met the deceased on his way to the mountain, and that deceased told him that the respondent Kirby was to join him and go with him. This was held to be error. It was held to be proper to show what deceased said about where he was going and his purpose in going, but that the statement that respondent was going with him was inadmissible.

In *State v. Miner*, 17 Kas., 208, the theory of the prosecution was that the respondents had lured the deceased from Kansas City to Topeka, and thence to Wichita; that at Wichita they had drugged him and murdered him by setting fire to the building in which he was. The evidence showed, among other things, that on the day before the murder the deceased was in Topeka, and there bade a friend good-by, and said he was going to Wichita. He was never seen or heard of afterwards. It was held that the declaration of the deceased, that he was going to Wichita, was properly admitted in evidence, the court saying: "Where a person seems to be preparing to leave a certain place, and does, in fact, leave, these acts and declarations may be given in evidence, along with other evidence, as tending to show that such person did in fact go to such other place, although the party against whom they are introduced was not present at the time the acts were performed or the declarations made."

In *Burns v. State*, 40 Ala., 370 (S. C., 1 Am. Crim. Rep., 324), the respondent was charged with murder. The evidence tended to show that deceased came to where the respondent was with a hostile purpose. The respondent and deceased walked off together, and that during their interview the respondent shot the deceased. It was claimed by the respondent that he killed the deceased in self-defense. The respondent offered to prove that when the deceased started to find him he said that he intended to kill the respondent. The evidence was excluded. The Supreme Court held that this was error, and that the

evidence w
"admissib
going to th
there is no
enable the
ate a doubt

BIGAMY :
to jury
mony —
by mista

On a trial
solemn
thercon
was not
rules an
Where, in b
consider
and it i
and not

It is improv
mony, a
marriage
ing that
tion the

However im
it, and
standards
verdict

The district
to the j
pencil t
vate you
or the g
new tri
by it, a
sufficient

ERROR
Hon. J.

The fac
point deci
assigned n
1. Give

evidence was admissible as a part of the *res geste*, saying that this evidence was "admissible to show the mental *status* of the deceased, and his motive in going to the still-house, and in inviting an interview with the prisoner. If there is no other evidence of the facts attending the killing, this evidence may enable the jury to determine who was the aggressor, and may properly generate a doubt of the guilt of the accused."

TAYLOR v. STATE.

(52 Miss., 84.)

BIGAMY: *Proof of marriage—Misconduct of jurors—Giving memorandum to jury—Identity of the first wife—Marriage by consent without ceremony—Juror—Improper conduct—Instructions—Pencil memorandum by mistake.*

On a trial for bigamy, proof of the first marriage by the minister who solemnized the rite, and the marriage license, with his certificate thereon, is sufficient proof. It is not a valid objection that the minister was not properly ordained as a minister of the gospel, according to the rules and regulations of his church.

Where, in bigamy, the first wife was known by two names, the question to be considered by the jury is the identity of the woman, and not her name, and it is proper for the court to so instruct the jury. It is the identity, and not the name, that is submitted to the jury.

It is improper to charge the jury that "a marriage was good without any ceremony, and by the mere consent of the parties, if the parties intended marriage, and that intent sufficiently appears." It is deficient in not adding that such consent and intent must be followed up by actual cohabitation thereunder as man and wife.

However improperly jurors may talk about a case in their deliberations upon it, and discuss things outside of the testimony, it would be erecting a standard too high, and would result in a defeat of justice, to set aside their verdict because they will do so.

The district attorney asked, and the court gave, a lengthy printed instruction to the jury, at the bottom of which the district attorney had written in pencil these words: "This is among a people of loose ways; try to elevate your race." *Held*, that if the testimony was in the least conflicting, or the guilt of prisoner in any way left in doubt, the court should grant a new trial. But where it is impossible for the jury to have been misled by it, and the guilt of the accused established beyond all doubt, it is not sufficient for a reversal.

ERROR to the circuit court of Colfax county.

Hon. J. A. ORR, Judge.

The facts of the case necessary to a full understanding of the point decided are set out in the opinion of the court. The errors assigned are:

1. Giving instructions for the state.

2. Refusing instructions asked by accused.

3. Refusing to grant a new trial.

Flaniken & Beckett, for plaintiff in error:

The first charge for the state is too broad. The indictment charges a former marriage with Maria Calvert, and a second marriage with Ann Dawson. These allegations must be proved: 24 Miss., 569; 28 Miss., 637; 8 S. and M., 576. The jury should have acquitted under this indictment: 3 Wharton's Cr. L., §§ 2625, 2627; *Ohio v. Moore*, 3 West. L. Jour., 134. The offense is regulated by statute: Roscoe's Cr. Ev., p. 293; 1 Bish. Cr. L., § 502. The first marriage must be valid: Roscoe's Cr. Ev., pp. 294, 300; 3 Whart. Cr. L., § 2635. In prosecutions for bigamy, the actual marriage must be proved: Bouvier's L. Dic., p. 110, § 16; p. 109, § 12. The sixth charge is too broad in criminal cases. It is laid down in a civil case, and is *obiter dictum*, in *Dickinson v. Brown*, 49 Miss., 370. Marriages will not be presumed in cases of bigamy as in civil cases: Roscoe's Cr. Ev., p. 294.

The court should have given the charges asked by the accused. The state must prove two things: 1. The two marriages. 2. The identity of the parties: Roscoe's Cr. Ev., pp. 294-305. One of the jurors prejudiced the case: 31 Miss., 480; 3 How., 27. See also Morris' State Cases, pp. 1051, 915, 674, 509, 476, 473, 430, 399, 392, 113, 107.

G. E. Harris, attorney-general, for the state:

The first charge defines the offense: Rev. Code 1871, § 2505. The regularity of the minister's ordination is immaterial: 49 Miss., 357; Const. Miss., art. 12, § 22.

The proof establishes a marriage binding in its effect, and not dependent upon mere consent of the parties followed by cohabitation, or upon any presumption of law. Both the first and second marriages are established, and the accused is guilty beyond all possible doubt, and I respectfully submit that there is no error shown in the record.

CHALMERS, J., delivered the opinion of the court.

The plaintiff in error was convicted of the crime of bigamy. The contest, as usual in such cases, was as to the proof of the first marriage. We think it was most conclusively established. The minister who solemnized the rites testified to the fact, and

produced
mance of

It is ob
properly
minister

It is w
the fact
acted as
713; *Ha*

The fir
the marri
Calvert, w
ment. It
person. I
of the cou

The jur
first time
is shown t
need not b
married, b

The jury
of the per
The jury v
any cerem
parties in
This instr
intent mu
man and v
however, t
cohabitati

It was
court belo
master of
the accuse
by the affi
conviction
to the jury
may be fo
outside of
and would
because th

produced the marriage license, with his certificate of the performance of the ceremony indorsed thereon.

It is objected that, according to his own testimony, he was not properly ordained, as was shown by the testimony of another minister of the same faith.

It is well settled that his open claim of being a minister, and the fact that he was generally understood and recognized and acted as such, is all that is necessary: Whart. Cr. L., §§ 2634, 713; *Hays v. The People*, 25 N. Y., 390.

The first wife was known by two names. She was styled in the marriage license Maria Draper. She was married as Maria Calvert, was usually so known, and was so named in the indictment. It was sufficiently proved that she was one and the same person. Nor was any injustice done defendant by the rulings of the court on this subject.

The jury were charged that "if the defendant married the first time any woman going by the name of Maria Calvert, who is shown to be now living, then the identity of said first woman need not be further shown than that she was the person actually married, be her name whatever it may."

The jury were thus correctly instructed that it was the identity of the person, and not the name, that was submitted to them. The jury were further charged that a marriage was good without any ceremony, and by the mere consent of the parties, if the parties intend marriage, and that intent sufficiently appears. This instruction is deficient in not adding that such consent and intent must be followed up by actual cohabitation thereunder as man and wife. The error was wholly immaterial in this case, however, as there was full proof of a valid ceremony and actual cohabitation.

It was made ground for the motion for a new trial in the court below that one of the jurors, who had been the former master of the defendant, stated in the jury-room that he knew the accused had at least three wives. This was made to appear by the affidavit of a party to whom this juror told it after the conviction, stating at the same time that this statement by him to the jury had produced the conviction. However improper it may be for jurymen to discuss in their deliberations anything outside of the testimony, it would be erecting too high a standard and would result in a defeat of justice, to set aside their verdict because they will do so. The surmise of the juror in this case,

that the fact stated by him had caused the conviction, could not of course be considered by the court.

A new trial was also asked because of some improper words written by the district attorney on one of his instructions.

It appears that the district attorney had a lot of printed instructions on the subject of reasonable doubts. One of these printed copies was given by the court to the jury. Its admirable statement of the doctrine tempts us here to set it out:

"The defendant is presumed to be innocent until he is proved to be guilty, and this presumption extends to the whole crime charged against him—innocent of the overt act, innocent of the felonious intent, innocent of the whole crime, and innocent of all its parts; and the guilt of the accused must be fully and conclusively established to a moral certainty. No preponderance of evidence, nor weight of preponderant evidence, is sufficient to warrant conviction unless it is so convincing as to generate full belief, to the exclusion of every reasonable doubt. But reasonable doubt is not vague conjecture, nor mere supposition or hypothesis, but it is such doubt as reasonably arises out of the testimony—a doubt for which a reason can be given.

"Mathematical or demonstrable certainty is not required. While the testimony should be equal to that which controls and decides the conduct of men in the highest and most important affairs of life, all that is required to enable a jury to return a verdict of guilty is, after a comparison and consideration of all the testimony, to believe conscientiously that it establishes the guilt of the defendant as charged."

At the bottom of this printed charge, the district attorney had written in pencil these words: "This is among a people of loose ways; try to elevate your race." It is conceded that the printed copy upon which these words had been written was unintentionally given to the jury. The words were probably intended as affording the suggestion of a point to be elaborated in oral argument. It is insisted, however, that inasmuch as the accused was a colored man, and a number of his own race were on the jury, the words were liable to be mistaken by the jurors for a portion of the charge, and as constituting a judicial exhortation to convict the prisoner for the good of their race. If we could believe that such a mistake could possibly have been made, or if the testimony was in the least conflicting, or the guilt of the prisoner in any way left in doubt, we should feel it our duty to give him

a new trial
been mis-
for ques-
Judges

NOTE.—
was found
the crime
valid mar-
country wh
the defend-
such a mar-
States amon
are migrato
married in
marriage w
adopted in
of this diffi-
that cohabit
marriage to
this subject

In *State v.*
the court he-
the prisoner,
John, 15 Ma-
held insuffi-
ground.

In *People v.*
riage was th
brought, it v
cient. So in
the trial of a
supported b
establish the
Lambert, 5 N
laws of Nev
proven, the
evidence of
of a valid ma-
prosecution.
126), in an a
foreign law
bigamy the
oner himsel
of the admis
are sufficien
Gratt. (Va.),
272; *Wolfert*
ton, 4 McCo
(Ky.), 679, S.

Vol.

a new trial. Deeming it impossible that the jury could have been misled, and the guilt being established beyond any room for question, we must decline to do so.

Judgment affirmed.

NOTE.—In some of the states it has been *held*, where, in a criminal case, it was found necessary to prove a marriage in order to convict the defendant of the crime with which he was charged, that all the requisites essential to a valid marriage must be strictly proved, as well as the law of the state or country where the marriage was celebrated, and also that the admissions of the defendant, cohabitation, and reputation, were not sufficient evidence of such a marriage. But experience has proven that such a rule in the United States amounts, in a large number of cases, to a denial of justice. Our people are migratory in their habits, and very many of our foreign born citizens were married in the countries where they were born. To prove, in Missouri, a marriage which was celebrated in Bavaria, or even in Canada, within the rule adopted in some cases, is oftentimes an impossible task. Doubtless, because of this difficulty, the rule has been modified, and the better doctrine now is, that cohabitation, reputation and admissions are sufficient evidence of a legal marriage to submit to a jury. The following are the principal authorities on this subject:

In *State v. Roswell*, 6 Conn., 446, a prosecution for incest, the majority of the court held that "neither cohabitation, reputation, nor the confessions of the prisoner," are admissible to prove his marriage, following *Com. v. Littlejohn*, 15 Mass., 163, where admissions, cohabitation, and reputation were held insufficient evidence of a marriage, and a conviction reversed on that ground.

In *People v. Humphrey*, 7 Johns., 314, where the only evidence of the marriage was the admission of the prisoner to the magistrate before whom he was brought, it was decided by the Supreme Court that the evidence was insufficient. So in *Gahagan v. People*, 1 Park Cr. (N. Y.), 378, it was *held* that "in the trial of an indictment for bigamy, the confessions of the defendant, though supported by proof of cohabitation and reputation, are not sufficient to establish the first marriage." And in an early case in Michigan (*People v. Lambert*, 5 Mich., 349), a conviction for bigamy was set aside because the laws of New Jersey, where the marriage took place, were not sufficiently proven, the court holding that cohabitation and admissions were not sufficient evidence of the marriage, and that "proof not only of a marriage in fact, but of a valid marriage, according to the laws of New Jersey, must be made by the prosecution." But in a later case in Michigan (*Hutchins v. Kimmel*, 31 Mich., 126), in an action for criminal conversation, the court hold that proof of the foreign law is not necessary. Greenleaf lays it down, that in prosecutions for bigamy the marriage may be proved "by the deliberate admission of the prisoner himself." 3 *Greenl. Ev.*, § 204. The following cases hold that evidence of the admissions of the defendant, coupled with cohabitation and reputation, are sufficient evidence of a marriage to leave to the jury: *O'Neale v. Com.*, 17 Gratt. (Va.), 582; *State v. Seals*, 16 Ind., 352; *Com. v. Murtagh*, 1 Ashm. R. (Pa.), 272; *Wolferton v. State*, 16 Ohio, 173; *Langtry v. State*, 30 Ala., 536; *State v. Britton*, 4 McCord (S. C.), 256; *Cayford's Case*, 7 Me., 57; *Com. v. Jackson*, 11 Bush (Ky.), 679; S. C., 1 Am. Cr. Rep., 74. In *West v. State*, 1 Wis., 200, the court hold

that a mere admission carelessly made by the defendant that the woman charged to be his wife is his wife, is insufficient evidence of the fact; but that a serious and solemn admission by the defendant that a marriage was solemnized between them, is evidence of the fact sufficient to be submitted to a jury. *Brown v. State*, 52 Ala., 338, is a case where the court, not denying the general rule as laid down in *Langtry v. State*, *supra*, yet hold the evidence in that case insufficient. Besides the case cited in the opinion, the case of *State v. Abbey*, 29 Vt., 60, is an authority that, upon a trial for bigamy, evidence that the person by whom a marriage ceremony was performed was reputed to be, and that he acted as a magistrate or minister, is admissible, and is sufficient *prima facie* proof of his official or ministerial character.

KISTLER v. STATE.

(54 Ind., 400.)

BLACKMAIL: *Indictment—Evidence in mitigation of punishment—Charge as to good character.*

An indictment which alleges in substance that the respondent threatened to falsely accuse the prosecutor, through hand-bills and newspapers, of keeping a woman as his mistress, with intent to extort money or property from him, is sufficient under the Indiana statute: 2 R. S. 1876, p. 449.

Where the jury must fix the punishment of the respondent if they find him guilty, the respondent has a right to prove on the trial, in mitigation of punishment, that he has already been imprisoned on the same charge, for a long time, and the jury should consider such evidence in mitigation of punishment.

It is error for a court to modify a request to charge that "evidence of good character is to be taken into consideration in determining the guilt or innocence of the accused" by adding, "but where guilt is positively proved, then good character will not benefit the defendant." Proof of good character is evidence to be weighed by the jury, on the question of the defendant's guilt, irrespective of the apparent conclusiveness or inconclusiveness of the other evidence.

NIBLACK, J. The indictment in this case, which was returned into court on the 11th day of November, A. D. 1875, by the grand jury for Marion county, charged "that, on the first day of August, A. D. 1874, at and in said county and state, one John Kistler did, then and there, unlawfully and feloniously, verbally and orally, make threats to one Adam Hereth that he, the said Kistler would falsely accuse the said Adam Hereth of certain immoral conduct which, if true, would tend to and would degrade and disgrace the said Hereth, to wit, that he, the said Adam Hereth, had been keeping one Nellie Deloss as his, the said Adam Hereth's, mistress, and had, at divers times and

places,
the said
said No
ing, wh
did, th
threaten
pers and
of said
form o
people c
to extor
chattels,
Hereth,
moneys
with int
advantag
grand ju
A mo
and the c
Upon
verdict o
three ye
overrulin
tions, re
The a
1st.
2d.
This c
See *Kist*
held to
that acc
The in
to be we
stantially
We are,
overrulin
On th
mitigatio
or inflict
county
months,

places, had sexual intercourse with and carnal knowledge of her, the said Nellie Deloss, not being lawfully married to her, the said Nellie Deloss, and having then and there a lawful wife living, which said charge and accusation he, the said John Kistler did, then and there, verbally and orally, to the said Hereth, threaten to publish, by having it printed in the public newspapers and prints then and there in circulation among the people of said county and state, and by having the same printed in the form of circulars and hand-bills, and distributed among the people of said county, with intent, then and there, and thereby, to extort, gain, and obtain from him, the said Adam Hereth, chattels, moneys and valuable securities of him, the said Adam Hereth, the kind, character, description and value of said chattels, moneys and valuable securities being to said jurors unknown, and with intent, then and there, and thereby, to gain other pecuniary advantages of said Hereth, the exact nature of which are to the grand jurors unknown, and can not be given."

A motion to quash the indictment was entered and overruled, and the defendant excepted.

Upon a plea of not guilty, and a trial by a jury, there was a verdict of guilty, fixing the punishment at imprisonment for three years in the state prison. The court, after considering and overruling a motion for a new trial, and properly noting exceptions, rendered judgment on the verdict.

The appellant assigns for error in this court:

1st. The overruling of the motion to quash the indictment.

2d. The overruling the motion for a new trial.

This case was in this court before, on a previous indictment. See *Kistler v. The State*, 50 Ind., 229. The indictment was then held to be defective, and the judgment on it was reversed on that account.

The indictment now before us is free from the objection held to be well taken to the former indictment, and is, we think, substantially sufficient under the statute. See 2 R. S. 1876, p. 449. We are, therefore, of the opinion that the court did not err in overruling the motion to quash the indictment.

On the trial of the cause the appellant offered to prove, in mitigation of any punishment which might be adjudged against or inflicted upon him, that he had already been imprisoned in the county jail and in the state prison, for the period of eighteen months, for the same offense on which he was then on trial. The

court refused to permit him to make this proof, and that refusal was one of the causes assigned for a new trial.

Our constitution provides that "cruel and unusual punishment shall not be inflicted," and that "all penalties shall be proportioned to the nature of the offense." See Constitution, art. 1, sec. 16, 1 R. S. 1876, p. 23.

This provision of our constitution, which is so entirely in accord with the principles of natural justice and of an enlightened public policy, lays down certain fundamental rules which are obligatory in the administration of public justice in this state.

According to the old law, all the jury had to do was to determine the question of guilt or innocence. It was the duty of the court, after a verdict of guilty, to declare the punishment which the law imposed. If any discretion was permitted as to the punishment, that discretion was exercised by the court alone. Circumstances, whether in aggravation or in mitigation, were considered by the court, when brought to its attention by the evidence.

We think it still the correct practice, when it devolves upon the court to determine the punishment, either upon its own finding or on a plea of guilty, for it to hear evidence in aggravation or in mitigation, as the case may be, where there is any discretion as to the punishment.

In our present criminal code, it is enacted that, "When the defendant is found guilty, the jury must state in their verdict the amount of fine, and the punishment to be inflicted:" 2 R. S. 1876, p. 404, sec. 116.

This is, in substance, a re-enactment of what has long been the law of our state. Hence our juries, in criminal causes, are not only required to determine the punishment, where there is a verdict of guilty, but are also invested with all the discretionary power in regard to such punishment that formerly belonged exclusively to, which, under certain circumstances, is still exercised by, the courts. While punishing the guilty, they are, equally with the courts, required to see to it that no cruel and unusual punishments are inflicted, and that all penalties are proportioned to the nature of the offense.

In considering the question of the nature or the extent of the punishment, the juries are now fairly entitled to all latitude which the courts have rightly exercised, in hearing evidence tend-

ing to en
Where a
of an al
such pun
might b
Any oth
on an er
after any
Any oth
holding
ishment
been imp
to his tri
on the tr
connectio

We are
to permit
onment in
of the su
upon him
minimum
this refus

After t
other thi
"evidenc
when pro
the guilt
court gav
the guilt
fit the def
and the ac
of the cau

It was
character
be taken
holding th
Roudenbu
the previ
instructed
previous
tingencies

ing to enlighten them in the exercise of a sound judicial discretion. Where a person has already suffered some punishment on account of an alleged offense, we think he ought to be entitled to prove such punishment in mitigation of any further punishment which might be inflicted, on a subsequent trial for the same offense. Any other rule would make it hazardous for a person convicted on an erroneous judgment to ask for a reversal of the judgment after any considerable portion of the punishment has been inflicted. Any other rule would have the effect, in many cases, of withholding evidence proper to be considered in adjusting the punishment to the nature of the offense. So, where a defendant has been imprisoned in the county jail, on a criminal charge, previous to his trial, we think he is entitled to prove that imprisonment on the trial, as a circumstance to be considered by the jury in connection with the punishment, if he shall be found guilty.

We are of opinion, therefore, that the court erred in refusing to permit the appellant in this cause to prove his previous imprisonment in the county jail and in the state prison, in mitigation of the subsequent punishment which was liable to be inflicted upon him, and as the punishment imposed was greater than the minimum authorized in such cases, he may have been injured by this refusal.

After the evidence had been concluded, the appellant, amongst other things, requested the court to instruct the jury, that "evidence of good character is admissible in criminal cases, and, when proved, is to be taken into consideration in determining the guilt or innocence of the accused." This instruction the court gave, but with the following modification: "But where the guilt is positively proved, then good character will not benefit the defendant." To this modification the appellant excepted, and the action of the court in making it was also assigned as one of the causes for a new trial.

It was formerly very generally held that the previous good character of the defendant, in a criminal proceeding, could only be taken into consideration in a doubtful case. A leading case, holding that view of the law, is that of *The United States v. Rouldebush*, 1 Bald., 514. In that case there was evidence of the previous good character of the defendant. The court instructed the jury that evidence of the previous good, or the previous bad character of the defendant might, in certain contingencies, be considered by, and have weight with them, but

that "when the evidence is clear, either way, character is out of the question."

In 3 Russ. Crimes, 300, it is said that "juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." See, also, 3 Greenl. Ev., 25, in which a like modern rule is laid down.

In the case of *Rensen v. The People*, 43 N. Y., 6, the charge to the jury in the court below was, in substance, very similar to the one we are considering. In reviewing that charge, the court of appeals say: "It was error to charge the jury that in any case evidence of good character would be of no avail. There is no case in which the jury may not, in the exercise of a sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false, or the witnesses mistaken. An individual accused of crime is entitled to have it left to the jury to form their conclusion upon all the evidence, whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him." The court then cites Russ. Crimes and Greenl. Ev., *supra*.

In the case of *Stover v. The People*, 56 N. Y., 315, the court held, that it was erroneous to charge that "when there is direct

evidenced
character

The w
in favor
ingredient
without
character
N. C., 6
Crim. La

We ar
making t
the appel

Other
appellant
arrived, n
present p

The ju
the proper

An indictm
note of
favor o
bad. A
To mak
received

NIBLAC
tion thirt
and punis

The inc
formal pa
in the ye
four, one
and there
ing there
at said co
to comm

evidence of the commission of a crime by a prisoner, then, good character goes for naught."

The weight of modern authority seems to be overwhelmingly in favor of the rule that proof of good character constitutes an ingredient to be considered by the jury, in all criminal cases, without reference to the apparently conclusive or inconclusive character of the other evidence. See *State v. Henry*, 5 Jones, N. C., 65; *Rex v. Stannard*, 7 Car. and P., 673; 1 Whart. Crim. Law, 7th ed., 644.

We are of the opinion that the court below also erred in making the modification it did to the instructions prayed for by the appellant, and in giving the instructions as thus modified.

Other questions are raised on the record and discussed by the appellant in his brief, but the conclusions at which we have arrived, render it unnecessary for us to consider them as at present presented.

The judgment is reversed, and the clerk is directed to issue the proper notice to the warden of the state prison.

STATE v. WALLS.

(54 Ind., 561.)

BRIBERY: *Void promissory notes—Indictment.*

An indictment, charging a prosecuting officer with receiving the promissory note of an accused person as a bribe to influence his official conduct in favor of the accused person in a criminal prosecution then pending, is bad. A promissory note, given for such a purpose, is absolutely void. To make out a case of bribery, it must be shown that the officer actually received something of value.

NIBLACK, J. This was a prosecution for bribery, under section thirty-nine of that portion of the criminal code which defines and punishes felonies. See R. S. 1876, p. 443.

The indictment contains three counts. Omitting the merely formal parts, the first count charges "that on the 5th day of July in the year of our Lord one thousand eight hundred and seventy-four, one James P. Waugh and George H. Waugh, were then and there charged with having committed a felony, to wit, having theretofore, to wit, on the 4th day of July, in the year 1874, at said county of Boone and state aforesaid, feloniously attempted to commit a violent injury upon the person of one Elizabeth

Waugh, they, the said George H. Waugh and James P. Waugh, then and there having a present ability to commit said injury, by then and there feloniously, purposely and with premeditated malice, shooting at and against the said Elizabeth Waugh, with a certain pistol then and there loaded with gunpowder and leaden shot, which the said George H. Waugh and James P. Waugh then and there in their hands held, with intent, then and there and thereby, her, the said Elizabeth Waugh, feloniously, purposely and with premeditated malice to kill and murder. That afterwards, to wit, on the 12th day of September, in the year of 1874, the grand jury of the county of Boone, and state of Indiana, duly returned into open court an indictment against the said George H. Waugh and James P. Waugh, then and thereby and therein charging and representing them, the said George H. Waugh and James P. Waugh, with the offense and felony aforesaid; and said indictment, so returned, was then and there pending and undisposed" (of); "and the grand jurors aforesaid do say that William B. Walls, on the 7th day of November, A. D. 1875, at the county of Boone, and state of Indiana, was then and there an officer intrusted with the administration of justice, to wit, prosecuting attorney within and for the twentieth judicial circuit of Indiana, duly elected, qualified and acting as such. That as such, it became and was the lawful duty of him, the said William B. Walls, on behalf of the state of Indiana, to prosecute the said indictment so pending against the said James P. Waugh and George H. Waugh. That the said William B. Walls, being prosecuting attorney as aforesaid, on the day and year aforesaid, at said county of Boone and state aforesaid, did then and there unlawfully, corruptly and feloniously receive, accept and take from said James P. Waugh an undue reward, to wit, the promissory note of the said James P. Waugh and one Daniel P. Waugh, payable to him, the said William B. Walls, and calling for the sum of twenty-five dollars, said promissory note being then and there of the value of twenty-five dollars, with the felonious intent that said undue reward should then and" (there) "influence his behavior in office, as such prosecuting attorney, in the prosecution of the offense and felony aforesaid."

The second count of the indictment was substantially the same as the first, except that the promissory note charged to have been received by the said Walls, of the said James P. Waugh and the said Daniel P. Waugh, was alleged to be for the sum of one

hundred
and twenty

There
third count
charged in

The co
second co
reserved c
count, and

The sta
it applies

"If any
* * *

to influence
charge of
on convict
thousand o
determined
hold any o
minate per

It is insu
are both d
it is not el
to have be
tion and e

Second.
them, to h
reward.

We thin
ment cha
language u
sufficient.
there cited

It is ag
tent with
tion shall
intrusted
doubtless,
general an

In our
gift, prop

hundred and twenty-five dollars, and the value of one hundred and twenty-five dollars.

There being no question before us arising out of or upon the third count, it is unnecessary that we shall repeat here what was charged in it.

The court, on the defendant's motion, quashed the first and second counts of the indictment. The prosecuting attorney reserved exceptions and then entered a *nolle prosequi* to the third count, and prayed and obtained an appeal to this court.

The statute under which this indictment was found, so far as it applies to the case before us, may be read as follows:

"If any officer intrusted with the administration of justice * * * shall take any money, gift, property or undue reward, to influence his behavior, * * * or action in office or discharge of official duty, * * * such officer * * * shall, on conviction thereof, be fined in any sum not exceeding ten thousand dollars and be imprisoned in the state prison for any determined period, not exceeding ten years, and be ineligible to hold any office of trust or profit, and disfranchised for any determinate period."

It is insisted that the first and second counts of the indictment are both defective in two essential particulars: First. Because it is not charged in either of them that the undue reward alleged to have been taken by the appellee was to prevent the prosecution and conviction of the said James P. Waugh.

Second. Because nothing of value is alleged, by either of them, to have been taken or accepted by the appellee as an undue reward.

We think the first objection is not well taken. The indictment charges the offense in substantial accordance with the language used in the statute in defining it. That, as a rule, is sufficient. See *Odell v. The State*, 34 Ind., 543; and authorities there cited.

It is against good morals, against public policy and inconsistent with the public safety that any merely mercenary consideration shall be allowed to influence the official conduct of any officer intrusted with the administration of justice, and hence it was, doubtless, that the statute we have above quoted was made so general and so comprehensive in its terms.

In our judgment, the acceptance by such officer of any money, gift, property or undue reward, with the corrupt purpose and

intent that his behavior in office or the discharge of his official duty, shall be influenced thereby in any particular cause, matter or proceeding, constitutes a crime under this statute, and we think it unnecessary to charge what particular effect it was intended such acceptance should have on the officer's official conduct. It seems to us quite sufficient to charge that, in regard to a specified official duty he corruptly and feloniously accepted an undue reward. When, however, it was intended that the undue reward should bring about or secure some particular illegal or improper result, or when some malfeasance in office has actually resulted therefrom, we think it better that this intended result or actual malfeasance should be charged in the indictment, so that the true character of the offense may be made more to appear; but we regard the question as to what influence the undue reward may have had, or was intended to have, or may have failed to have on the official conduct of the officer as a circumstance to be considered, either in aggravation or in mitigation of the offense, as the case may require, having reference to all the facts connected with it.

The second objection to the counts of the indictment before us we regard as well taken, and as fatal to these counts. To make out a case of bribery under the statute governing this proceeding, it must be shown that the officer actually received something of value. It is not enough to charge that something of value was promised to be paid or promised to be given to him. Such a promise could not be enforced, and hence can not be considered as having any real value.

A note executed to a public officer to improperly influence his official conduct is not only without a valid consideration, but is against public policy, and hence utterly void.

For this reason, the notes alleged to have been executed by the said James P. Waugh and Daniel P. Waugh to the appellee, to influence his behavior in office, as they are described in the indictment, must be held to be void and of no value, and not to have constituted an undue reward within the meaning of the statute.

However reprehensible the alleged conduct of the appellee may be considered, as a breach of official and professional duty, we are of the opinion that the court below did not err in quashing the first and second counts of the indictment against him.

The judgment is affirmed.

NOTE.—The criminal proceeding in *Pudgett*, 36 G. 2d, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

A person, in
for the p
escape.

INFORMA
Hartford c
before PAR

On the t
and claim
house of
the second
which win
position b
Davis, the
Davis's ro
making hi

The att
law, that,

NOTE.—That a note, given to secure the suppression or discontinuance of a criminal prosecution is void, see *Smith v. Richards*, 29 Conn., 232; *Brown v. Pudgett*, 36 Geo., 609; *Sloan v. Chandler*, 8 B. Mon. (Ky.), 97; *Com. v. Johnson*, 3 Cush. (Mass.), 534; *Murphy v. Botomer*, 40 Mo., 67; *Plummer v. Smith*, 5 N. H., 553; *Porter v. Havens*, 37 Barb., 343; *Boicen v. Buck*, 28 Vt., 308. But this rule does not apply in cases of misdemeanor, where the party has a remedy by civil action, as in cases of assault and battery, and the like: *Mathison v. Hawks*, 2 Hill (S. C.), 625; or in bastardy cases: *Burgen v. Stranghan*, 7 J. J. Marsh. (Ky.), 583; *Hays v. McFurlan*, 32 Geo., 609; *Weaver v. Waterman*, 18 La. Ann., 241; *Howe v. Litchfield*, 3 Allen (Mass.), 443; *Rice v. Maxwell*, 21 Miss. (13 Smed. and M.), 289; *Stephens v. Spiers*, 25 Mo., 386; *Sharp v. —*, 9 N. J. L., 352; *Payne v. Eden*, 3 Caines R., 212; *Maxwell v. Campbell*, 8 Ohio St., 265; *Wright v. Priest*, 2 Vt., 507; *Robinson v. Crenshaw*, 2 Stew. and P. (Ala.), 276. Generally, it may be said that notes given to secure one's influence in any form, for the purpose of influencing any officer or body intrusted with a public duty, are void. See *Buck v. Bank*, 27 Mich., 293; *Pingry v. Washburn*, 1 Aiken, 264; *Clipping v. Hepbaugh*, 5 W. and S., 315; *Hatzfield v. Gulden*, 7 Watts, 152; *Fuller v. Dawe*, 18 Pick., 472; *Wood v. McCann*, 6 Dana, 366; *Marshall v. B. & O. R. R. Co.*, 16 How., 314; *Sedgwick v. Stanton*, 14 N. Y., 289; *Frankfort v. Winterport*, 54 Me., 250; *Martin v. Wade*, 37 Cal., 163.

STATE v. WARD.

(43 Conn., 489.)

BURGLARY.

A person, in the night season, entered a dwelling-house, without breaking, for the purpose of committing a felony, but broke out in making his escape. *Held* to be burglary.

INFORMATION for burglary; brought to the Superior Court in Hartford county, and tried to the jury, on the plea of not guilty, before PARDEE, J.

On the trial the attorney for the state offered evidence to prove and claimed to have proved, that the defendant entered the house of one Gantz, in the night season, through a window in the second story of the house, about fifteen feet from the ground, which window was raised about six inches and supported in this position by an oil can, with intent to steal the goods of one Davis, then in the room; and that he unlocked the door of Davis's room and the outer door of the house for the purpose of making his escape therefrom.

The attorney asked the court to charge the jury, as matter of law, that, if they found the above facts to be proved beyond a

reasonable doubt, they would support a verdict of guilty upon the charge contained in the information; and the court so charged.

The jury having returned a verdict of guilty, the prisoner moved for a new trial for error in the charge of the court.

A. F. Bygoneson, in support of the motion:

1. The breaking out of the house was not felony at common law. Sir Matthew Hale says in his Pleas of the Crown, p. 554. "If a man enters, in the night time, by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary, for *fregit et exivit, non fregit et intravit*." And Coke says a burglar is "he that by night *breaketh and entereth* into a mansion house with intent to commit a felony."

2. But the attorney for the state relies upon the English statute of 12 Anne, as having become a part of the common law of this state. That statute provides that "if any person shall enter into the dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or, being in such house, shall commit any felony, and shall, in the night time, break the said house to get out of the same, such person is, and shall be, adjudged and taken to be guilty of burglary." The preamble to that act is as follows: "Whereas there has been some doubt whether the entering into the mansion house of another, without breaking the same, with an intent to commit some felony, and breaking the said house in the night time to get out, be burglary, be it declared and enacted, etc." This act was passed after Sir Matthew Hale had expressed the opinion we have quoted, and in view of the prevailing opinion to the same effect as to the common law upon the point in question, and must be regarded as an original enactment setting aside the common law and not declaratory of it.

3. This statute has never become a part of the common law of this state. No authority holds that an English statute, passed subsequently to the emigration of our ancestors, constitutes a part of the common law of this country. It must have passed before: 1 Kent Com., 473. The colony of Connecticut dates from 1635. It received its charter in 1662. The statute 12 Anne was enacted in 1713. At the head of the statute book of the colony of Connecticut, from 1650 to 1784, appears the following significant law: "Be it enacted by the governor, council

and represe
shall be ta
stained, no
be by virtu
ranting the
published;
lar case, by
God." Th
by sixty-thr
has never h
any English
existence as
New York
the discussi
the common
all the cour
and since t
our situatio
as one entir
Com., 472.
has deemed
the statute o
its being a
assumed, in
12 Anne as
statutes by
statutes, not
become so
distinguishe
Brainard,

W. Ham

1. The
1 Russell or
The whole r
breaking ou
not an offen
The attempt
reason of th
night. The
breaking at
felonious in

and representatives in general court assembled, that no man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, * * * unless it be by virtue or equity of some *express law of this colony*, warranting the same, established by the general court, and sufficiently published; or in case of the defect of such law, in any particular case, by some clear and plain rule warranted by the word of God." This colonial enactment precedes the statute of 12 Anne by sixty-three years. But the common law of England, *as such*, has never had any force in the state of Connecticut, much less any English *penal* statute, enacted seventy-eight years after our existence as a colony: *Fitch v. Brainard*, 2 Day, 189. The New York and Massachusetts decisions are of no assistance in the discussion of this matter, because in the Massachusetts colony the common law of England was accepted and put in practice in all the courts in that province by special commission of the king, and since then the English common law, so far as applicable to our situation and government, has been recognized and adopted as one entire system by the constitutions of those states: 1 Kent Com., 472. Notwithstanding all this, the state of New York has deemed it prudent to place upon its statute book substantially the statute of 12 Anne, apparently "being in some doubt" as to its being a part of their common law. Connecticut has never assumed, in its courts of justice, or declared by statute, the 12 Anne as the law of this state. The only adoption of English statutes by the courts of this state has been that of ancient statutes, *not penal*, whose corrective and equitable principles had become so interwoven with the common law as to be scarcely distinguishable therefrom: *Strong's Case*, Kirby, 345; *Fitch v. Brainard*, 2 Day, 189.

W. Hamersley, state's attorney, *contra*:

1. The statute 12 Anne is declaratory of the common law: 1 Russell on Crimes, 792. It is so expressed by the act itself. The whole reason of the thing is in favor of the view that makes a breaking out burglary as much as a breaking in. Burglary is not an offense against property. It is an offense against security. The attempt to commit a felony becomes an actual felony by reason of the violation of the security of the dwelling-house by night. The security of the house is just as much violated by a breaking at the time of the exit as at the time of the entry. The felonious intent accompanies the burglar throughout his attempt.

The attempt is one act from the entry to the exit. It is immaterial at what stage of the act the violence is committed, whether at the entry, after the entry and before the exit, or at the exit. Or rather, the attempt being one act, it is not divisible for any such purpose; a breaking during the attempt affects the whole act. This view of the law of burglary has been adopted by the American text-books without exception, and has not been questioned in any reported decision: 2 Swift Dig., 331; 2 Bennett and Heard's Lead. Cas., 62; 2 Bishop Crim. Law, §§ 84, 86; 3 Greenl. Ev., § 76; *Sand's Case*, 6 Roger's City Hall Recorder, 1.

2. The common law of England, so far as the same was consistent with the local circumstances of the colony, was the common law of Connecticut at the time of its settlement, and so remains unless altered by legislation. All English statutes modifying this common law, passed prior to our settlement, were operative here as a part of our common law: 1 Bishop Crim. Law, § 13; *Commonwealth v. Leach*, 1 Mass., 61. English statutes passed since the settlement of the colony and before the revolution, modifying the common law then prevailing in the colony, may also be operative now as part of our common law. Their operation depends upon the question whether they were adopted or acquiesced in during the colonial stage: 1 Bishop Crim. Law, § 13. For such adoption no legislative action is required. And it is not necessary to show affirmatively that the rule has been received in some judicial proceeding: *Commonwealth v. Chapman*, 13 Met., 72. A beneficial statute, in amendment of the common law, may be presumed to have been adopted here: *Sackett v. Sackett*, 8 Pick., 316; *Boynton v. Rees*, 9 Id., 531; *Commonwealth v. Chapman*, 13 Met., 73. In Connecticut the inhabitants, by virtue of the charter of Charles II., were entitled to the liberties and immunities of English subjects the same as if born in England, and the colonial legislature was forbidden to enact laws contrary to the laws and statutes of England. Our courts have held that a statute of Anne, in amendment of the common law, qualifies that law as existing in Connecticut, though no case arose under the statute until after the revolution: *Strong's Case*, Kirby, 345.

FOSTER, J. Upon the trial of this case to the jury, the public prosecutor offered evidence to prove, and claimed that it did prove, that the defendant entered the house of one Gantz in the

night season
feet from the
and support
steal the goods
unlocked the
house, for the
attorney for the
matter of the
a reasonable
the charge
the jury, and
a new trial

We think
crime are com-
are produced
be material
house of an
felony. The
intent, the
crime.

The accusa-
order of do-
necessary to
burglary was

It is true
for the pur-
Chief Justice
beth Clark,

The offer
to the hear-
technicalitie
was a won-
ered well
passed as a
doubted, it
enter into
by night, w
felony; or,
shall, in th
same, such
glary, and

night season, through a window in the second story, about fifteen feet from the ground, which window was raised about six inches and supported in this position by an oil can, with an intent to steal the goods of one Davis then in the room, and that he unlocked the door of Davis' room and the outer door of the house, for the purpose of making his escape therefrom. The attorney for the state asked the court to charge the jury as matter of law, that if they found the above facts proved beyond a reasonable doubt, they would support a verdict of guilty of the charge contained in the information. The court so instructed the jury, and they returned a verdict of guilty. The motion for a new trial raises the question, was this instruction correct?

We think it was. If each and every of the acts constituting a crime are committed, and all the evils consequent on the crime are produced, the precise order in which the acts are done cannot be material. Now, burglary is the breaking and entering the house of another in the night season, with an intent to commit a felony. The jury have found that, coupled with the guilty intent, the accused committed every act going to make up this crime.

The accused stood not on the doing of these acts, nor on the order of doing them, except so far forth as was convenient and necessary to accomplish his guilty purpose. That this offense is burglary we can have no doubt.

It is true that doubts have been expressed whether a breaking, for the purpose of escape, constituted burglary. Lord Hale and Chief Justice Trevor expressed such doubts on the trial of Elizabeth Clark, at the Old Bailey, in 1707.

The offense was punishable with death, and it was creditable to the hearts of judges to make fine distinctions and insist on technicalities in favor of human life, especially when the offender was a woman. The law, however, was then generally considered well settled, and so the statute of 12 Anne was soon after passed as a declaratory act. After stating the law to have been doubted, it was "declared and enacted, that if any persons shall enter into the mansion or dwelling-house of another, by day or by night, without breaking the same, with an intent to commit felony; or, being in such house, shall commit any felony, and shall, in the night time, break the said house to get out of the same, such person is and shall be adjudged to be guilty of burglary, and shall be ousted of the benefit of clergy in the same

manner as if such person had broke and entered the said house in the night time, with an intent to commit burglary there?" Stat. 12 Anne, c. 7.

We incline to the opinion that the facts found to have been committed by the accused constituted the crime of burglary, at common law, and that the statute of Anne, above quoted, should be regarded simply as declaratory of that law.

If the statute be viewed in another aspect, as in alteration and amendment of the common law, it may still, perhaps, be considered a part of our law by adoption, though not of binding force as a statute. Statutes of this character, passed by parliament before our declaration of independence, have been adopted by our sister states as part of their common law: *Commonwealth v. Leach*, 1 Mass., 59; *Commonwealth v. Knowlton*, 2 Mass., 534; *Pemble v. Clifford*, 2 McCord, 31; *Sackett v. Sackett*, 8 Pick., 309; *Boynton v. Rees*, 9 Pick., 528; *Commonwealth v. Chapman*, 13 Met., 68. In this state, in 1787, our superior court recognized and adopted the statute of 9 Anne, altering and amending the common law relating to writs of *mandamus*: *Strong's Case*, Kirby, 345.

We are satisfied with the charge of the court, and advise no new trial.

In this opinion the other judges concurred, except Pardee, J., who, having tried the case in the court below, did not sit.

NOTE.—"Where the defendant entered a dwelling at night without breaking, but with felonious intent, the mere unlatching or breaking of a door, in an attempt to escape, does not make the offense burglary:" *Rolland v. Com.*, 82 Pa. St., 306. And to the same effect is *White v. State*, 51 Ga., 885.

RATEKIN v. STATE.

(26 Ohio St., 420.)

STATUTORY BURGLARY.—*Tobacco house.*

A building on a farm, built and used for the purpose of storing and drying tobacco, but occasionally used for storing flax and hay, is a barn, and within the Ohio statute against burglary.

By the COURT. The plaintiff in error was convicted and sentenced for burglary. The count of the indictment on which he was convicted described the building alleged to be the subject of the burglary as a "barn." On the trial, the evidence showed

that the b
called a "
farm, and
and drying
storing ha
court belo
might be
crime, and
indictment
think the
and meanin
indictment
pose of stor
statutory d
Motion o

CRIMINAL LA
money

In an indictm
inal near
spiracy be
statute), t
stated.

Thus, where t
from a ce
and subtle
cally such
tenses bel

In such a pros
son from
spired to
of the def

Thus, where n
boxes, fals
a view to
confederat
for having
taining on
facts of a
VOL. II

that the building broken and entered was what is commonly called a "tobacco house." It was a building erected upon the farm, and designed and used mainly for the purpose of storing and drying tobacco, but occasionally used also for the purpose of storing hay and flax. The question presented is, whether the court below erred in holding, as it did, that such a building might be the subject of burglary under the statute defining that crime, and whether it was properly described in said count of the indictment. We answer both questions in the affirmative. We think the building in question was a "barn" within the intent and meaning of the statute, and was properly described in the indictment by that name. The fact that it was used for the purpose of storing products of the farm, we think, entitles it to that statutory designation.

Motion overruled.

STATE v. CROWLEY.

(41 Wis., 271.)

CRIMINAL LAW: *Conspiracy—Form of indictment—Conspiracy to obtain money under false pretenses—Essential conditions of the crime.*

In an indictment or information for a conspiracy to do a lawful act by criminal means, the means must be particularly set forth. But if the conspiracy be to do an act in itself unlawful (whether at common law or by statute), the means by which it was to be accomplished need not be stated.

Thus, where the object of the conspiracy, as charged, was to obtain money from a certain person "by false pretenses, and by false and privy tokens and subtle means and devices," it was not necessary to state more specifically such pretenses, tokens or devices; the obtaining money on false pretenses being a crime by statute.

In such a prosecution, if it appears that the transaction on the part of the person from whom the money was obtained, or from whom defendants conspired to obtain it, would have been *unlawful* in case the representations of the defendants had been *true*, there can be no conviction.

Thus, where money was paid by A to certain conspirators to get possession of boxes, falsely represented by the latter to contain counterfeit money, with a view to uttering the same, and a further sum was paid to one of the confederates, who was a constable, to prevent a threatened arrest of A for having such counterfeit money in possession (the boxes in fact containing only saw-dust), the confederates cannot be convicted, upon these facts of a conspiracy to obtain money of A upon false pretenses.

Reported from the circuit court for Munroe county.

The defendants were tried and convicted upon an information charging them with a criminal conspiracy. The circuit court suspended judgment, and reported the case to this court pursuant to the statute (R. S., ch. 180, sec. 8) for the determination of the following questions of law:

1. Does the first count of the information on which the defendants were tried, charge a criminal offense?

2. Does the evidence in the case support the charge of conspiracy as contained in said first count?

It is charged in said first count of the information, that, on the day and at the place therein specified, the defendants, "wickedly and unjustly devising and intending one Daniel Burke to defraud and cheat of his money and property, did then and there unlawfully, falsely and fraudulently conspire, combine, confederate and agree together and among themselves, to get and obtain, knowingly and designedly, by false pretenses and by false and privity tokens and subtle means and devices, of him the said Daniel Burke, one hundred and ten dollars in money, the money and property of him the said Daniel Burke, of the value of one hundred and ten dollars, with the intent then and there to cheat and defraud him the said Daniel Burke of the said money, against the peace and dignity of the state of Wisconsin."

The testimony on the trial to which the second question relates is substantially as follows: The defendant *C. Crowley* solicited Daniel Burke to pay him fifteen dollars for one hundred and fifty dollars of counterfeit money. Burke agreed to purchase the same, and paid *Crowley* the fifteen dollars therefor. The latter inclosed the money in a letter to some person (who, the prosecution claims, is the defendant *James Crowley*), and sent the letter by mail. This occurred at Sparta, Wis. After some days, Burke received a letter mailed at Lake City, Minnesota, and signed "C. O'Donnell," acknowledging the receipt of the fifteen dollars and promising to forward "*the goods*" in a few days. About a month later, Burke received another letter similarly signed, and mailed at Jefferson, Wis., informing him that the writer had sent him by express to Dover (a railway station near Sparta), a box marked "Condition Powders," containing "\$1,000 of various denominations, with full directions how to pass it, in print," and requiring Burke to pay the express agent twenty dollars, and to remit the balance, \$65, as soon as he could.

Burke then
agent the
found that
informed
promised
about it."

A week
Oconomowoc
which the
of Burke's
more to Gr
\$25 down,
balance of
it out of th
and express
Sparta. C.
were walkin
were arreste
Carnahan
and threaten
after some
silent for \$1
remaining \$
nahan, took
and scraps o

The foreg
of the secon
history of th
which was
which at lea
(whoever th
hundred dol

Burke pu
with the int
is claimed b
that the let
defendant J

Briefs we
Hall & Sk
cause was ar
D. Hall. T

Burke thereupon went to Dover, found the box there, paid the agent the charges and \$20, took the box home, opened it, and found that it contained nothing but grass and a cigar box. He informed *C. Crowley* of the contents of the box, and the latter promised to make it all right, and to write "the company about it."

A week or two later, Burke received another letter, mailed at Oconomowoc, and signed as were the others, "C. O'Donnell," in which the writer indulges in some doubts as to the truthfulness of Burke's story, but informs him that he has shipped \$1,000 more to Greenfield for him. This letter required Burke to pay \$25 down, and proposed to wait for the balance of \$75, and the balance of \$65 due on the first transaction, till he should "realize it out of the business." Burke went to Greenfield, paid the \$25 and express charges, obtained the box, and returned with it to Sparta. *C. Crowley* met him there at the depot, and as they were walking up town together, having the box with them, they were arrested by the defendant *Carnahan*, who was a constable. *Carnahan* accused them of having counterfeit money in the box, and threatened to expose them and have them punished; but, after some negotiation, he agreed to settle the matter and keep silent for \$150. Burke agreed to pay \$50, and *C. Crowley* the remaining \$100. A few days later, Burke paid the \$50 to *Carnahan*, took the box home, opened it, and found only sawdust and scraps of paper.

The foregoing are all the facts essential to the determination of the second question; although it may be stated as part of the history of the case, that subsequently, by similar devices, among which was another empty package and another arrest, and in which at least one of the Crowleys participated, the confederates (whoever they were) succeeded in obtaining from Burke two hundred dollars more.

Burke purchased the counterfeit money for the purpose and with the intention of uttering and passing it as good money. It is claimed by the prosecution, and the evidence tends to prove that the letters were written and the boxes forwarded by the defendant *James Crowley*.

Briefs were filed for the defendants, signed respectively by *Hall & Skinner*, and by *Cameron, Losey & Bunn*; and the cause was argued orally in their behalf by *Charles W. Bunn* and *D. Hall*. They argued substantially as follows:

1. An information for a conspiracy to obtain money by false pretenses must set out the means to be used: *Com. v. Eastman*, 1 Cush., 189; *Com. v. Shedd*, 7 Id., 514; *Com. v. Hunt*, 4 Met., 111; *Lambert v. People*, 9 Cow., 578; *State v. Hewett*, 31 Me., 396; *State v. Roberts*, 34 Id., 328; *Com. v. Prius*, 9 Gray, 127; *Com. v. Wallace*, 16 Id., 221; *Alderman v. The People*, 4 Mich., 414; *State v. Potter*, 28 Iowa, 554; *State v. Stevens*, 30 Id., 391; *State v. Jones*, 13 Id., 269; *March v. The People*, 7 Barb., 391; *Hartmann v. The Com.*, 5 Barr, 60.

2. The statute against false pretenses applies only to legitimate trade and business (*People v. Clough*, 17 Wend., 351), and certainly was not intended to protect criminal contracts, or parties engaged in criminal transactions: *People v. Stetson*, 4 Barb., 151; *People v. Williams*, 4 Hill, 9; *McCord v. The People*, 46 N. Y., 470.

3. Where the exercise of common prudence and caution would enable one to avoid being imposed upon by the false pretenses, they are not within the statute: *State v. Green*, 7 Wis., 676; *State v. Simpson*, 3 Hawks., 620; *People v. Williams*, *supra*; *People v. Crissie*, 4 Denio, 525; *Com. v. Drew*, 19 Pick., 179; *Com. v. Norton*, 11 Allen, 266.

4. The statutory offense is the use of false pretenses "with intent to defraud." Burke was not defrauded, but greatly benefited, by getting what he actually got instead of what he expected.

5. A false pretense under the statute must relate to a past event or existing fact; while here there was merely a promise to do a future criminal act, and a breach of that promise: *Regina v Goodhall*, R. & R., 461; *Rex v. Oates*, 29 Eng. L. & E., 552; *Dillingham v. The State*, 5 Ohio St., 280; *Com. v. Burdick*, 2 Barr, 163; *Com. v. Drew*, *supra*.

The Attorney-General and J. M. Morrow, district attorney of Monroe county, for the state:

1. The obtaining of money or goods under false pretenses is a crime (R. S., ch. 165, sec. 38); a combination or confederacy to commit such crime is also a crime, though nothing be done in prosecution of it, the offense being complete when the confederacy is made (2 Arch. Cr. Pr., 9th ed., 1045, and cases there cited; 2 Bishop's Cr. L., title "Conspiracy;" 3 Greenl. Ev., Redfield's ed., title "Conspiracy," § 89, etc.; 3 Whart. Cr. L., 6th ed., § 2291, etc.), and it was not necessary to state in the information the means which were to be used: 2 Bish. Cr. Prac., 217, 218; 1 Id., 516; 2 Arch. Cr. Pr., 1040, note; 3

Whart. Cr. Prec., 338; 30 Id., 1; 7 Serg. & Id., 253; *v. Richardson*, 310; *Joh* ch. 137, s.

2. The spiracy. Burke; the arrest.

The co are not t doctrines be calcula a thing, c itself may deceive: *Young v.*

LYON, J. defendant fails to s employ f Their pos defendant out in the

Were t false prote it to be w tenses res set out v thereof in ch. 165, s 7 Wis., 67

But the between a false prote case the former.

Whart. Cr. L., §§ 2293, 2295; 3 Chitty's Cr. L., 1143; Whart. Prec., 334-351; *State v. Ripley*, 31 Me., 386; *State v. Bartlett*, 30 Id., 132; *State v. Noyes*, 25 Vt., 415; *Com. v. Gillespie*, 7 Serg. and R., 469; *Hazen v. The Com.*, 11 Harris, 365; 10 Id., 253; *State v. Buchanan*, 5 Harris and Johns., 317; *People v. Richards*, 1 Mann. (Mich.), 217; *People v. Clark*, 10 Mich., 310; *Johnson v. People*, 22 Ill., 314. See, also, laws of 1871, ch. 137, sec. 2.

2. The evidence in this case supports the charge of conspiracy. The object of this conspiracy was to obtain money of Burke; the means used were certain false pretenses and pretended arrest.

The conspiracy is the gist of the offense; the means used are not the crime, but only evidence of the crime. And the doctrines applied by the court to false pretenses, that they must be calculated to deceive, and must not be a mere promise to do a thing, do not apply to conspiracies, because the combination itself may make any pretense formidable and give it power to deceive: 7 Serg. and R., 469; *Queen v. Orbell*, 6 Mod., 42; *Young v. The King*, 3 Term., 98.

LYON, J. I. It is maintained by the learned counsel for the defendants, that the information is fatally defective in that it fails to show the means which the defendants conspired to employ for the purpose of defrauding Burke of his money. Their position is, that the false pretenses and devices which the defendants conspired to use to that end should be specifically set out in the information.

Were this an information for obtaining money of Burke by false pretenses, the position would be well taken. For we take it to be well settled, that in such an information the false pretenses resorted to by the accused to perpetrate the fraud must be set out with reasonable particularity, and that an averment thereof in general language of the statute on that subject (R. S., ch. 165, sec. 38), is insufficient before verdict: *State v. Green*, 7 Wis., 676.

But there is, undoubtedly, a broad distinction in this respect between an information for obtaining money or property by false pretenses and one for a conspiracy to do so. In the latter case the averment may be less specific than is required in the former. The distinction is well stated by Dewey, J., in *Com.*

v. Eastman, 1 Cush., 223, as follows: "If an indictment for murder should allege merely that the accused had committed the crime of murder upon the person of one A B, or if an indictment for larceny should simply set forth that the defendant had stolen from C D, in neither case would the offense be set forth with the particularity and precision required by law. It must be conceded, however, that in indictments for conspiracy a different rule prevails to some extent; and the precise inquiry which we have now to make is, to what extent." The offense of conspiracy, in one respect, is doubtless peculiar. It may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons may, by such assent and agreement, ripen into crime, although no act be done in pursuance of it.

"The peculiar character of this offense has fully justified, in certain cases of conspiracy, a departure from the ordinary rules of criminal pleading. The means proposed to be used to effect a criminal purpose are not, in all cases, to be set out, and are not, in all cases, required to be proved; nor are they, in all cases, a necessary element of the crime of conspiracy. To a certain extent, the rules upon the subject are uncontroverted. If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act, which is a well-known and recognized offense at common law, so that by reference to it as such, and describing it by the term by which it is familiarly known, the nature of the offense is clearly indicated, in such a case a charge of conspiracy to commit the offense, describing it in general terms, will be proper. On the other hand, if the agreement or combination be to do an act which is not unlawful in itself, by the use of unlawful means, those means must be particularly set forth, or the indictment will be bad." This is, doubtless, a correct statement of the law, and were the obtaining of property by false pretenses a common law offense in every case, there would be no doubt of the sufficiency of the information in the present case. But in many cases the obtaining of money or property by such means is not a criminal offense at common law, but is only so by virtue of the statute: R. S., ch. 165, sec. 38. The question is, therefore, whether one rule of pleading should be applied to an information charging a conspiracy to do an act criminal at the common law, and another rule to an information

charging
We are av
the two ca
unable to
tion. In
averments
and, that
criminal b
both cases
be applied

An ind
or more p
criminal c
in itself c
Per Shaw
some qua
them her
the cases
the consp
stated in
in each is
unlawful,
last case
"When t
agreement
criminal
stated in
which is
compass c
ful, by t
unlawful
other crim
ment. S
lish auth
P. C., 46
senator, f

The fa
federacy
pose, wh
ment, the

charging a conspiracy to do an act made criminal by statute. We are aware that there are decisions which seem to hold that the two cases are governed by different rules, but we are quite unable to find any solid ground upon which to rest the distinction. In either case the information must contain sufficient averments to show that the conspiracy was to do a criminal act; and, that appearing, what can it signify that such an act is made criminal by statute instead of being so by the common law? In both cases it would seem that the same rules of pleading should be applied.

An indictable conspiracy is defined to be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means: Per Shaw, C. J., in *Com. v. Hunt*, 4 Met., 123. There are some qualifications to this definition, but we need not consider them here. It will be found, on examination, that in many of the cases which hold that the means by which the purposes of the conspirators are to be accomplished must be particularly stated in the indictment or information, the conspiracy alleged in each is to accomplish some purpose not in itself criminal or unlawful, but by the use of criminal or unlawful means. In the last case cited (*Com. v. Hunt*), Chief Justice Shaw said: "When the criminality of the conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, and if the criminality of the offense which is intended to be charged consists in the agreement to compass or promote some purpose not of itself criminal or unlawful, by the use of fraud, force, falsehood or other criminal or unlawful means, such intended use of fraud, force, falsehood or other criminal or unlawful means must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform: 1 East. P. C., 461; 1 Stark. Crim. Pl. (2d ed.), 156; opinion of Spencer, senator, 9 Cow., 586, *et seq.*"

The fair inference from this language is, that where the confederacy consists in an agreement to accomplish a criminal purpose, while the *purpose* must be clearly expressed in the indictment, the specific *means* by which it is proposed to accomplish it

need not be averred. And we think this view is sustained by the weight of authority.

This information charges a combination of the defendants to accomplish a criminal purpose, to wit, to defraud Burke of his money by false pretenses, tokens and devices, and such *purpose* is fully and clearly stated in the information. We think the information fulfills the requirement of the declaration of rights (Const., art. 1, sec. 9), in that it states sufficiently "the nature and cause of the accusation" against the defendants; and that it is not essential to set out the specific means by the use of which the alleged conspirators proposed to accomplish their criminal purpose.

This view is supported by the consideration that the conspiracy itself constitutes the offense, although the purpose of it be not effected.

Had the defendants met and agreed to obtain one hundred and ten dollars of Burke, by means of false pretenses and devices, or by the use of privy and false tokens, and left it to one of their number to execute the conspiracy by employing such pretenses, tokens or devices to that end as he might choose, there is no doubt the offense would have been complete, and that an indictment for a conspiracy to compass a criminal purpose would lie against the defendants, although nothing had been done in execution thereof. Yet, in such an indictment, it would be impossible to set out the specific means by which the criminal purpose was to be accomplished, for they were never agreed upon. True, no such difficulty would arise where the objects of the conspiracy have been executed; but we are not aware that the law makes any distinction between executed and unexecuted conspiracies in respect to the averments required in indictments therefor.

The first question submitted by the learned circuit judge must, therefore, be answered in the affirmative.

II. We are now to determine the second question submitted to us, which is as follows: Does the evidence in the case support the charge of conspiracy as contained in the said first count? It has already been said that the information charges a conspiracy by the defendants to commit an act made criminal by section thirty-eight of the statute—that is, to obtain money of Burke, knowingly and designedly, by false pretenses, and by false and privy tokens. It seems clear that the defendants can-

not lawfully obtain money of Burke, and that the information, un-
thereof was

The only purpose, is
Burke.

Hence, in
of section
support the
otherwise n
the defend
tion on an
obtaining n

The fifth
Crowley, w
the latter
money for
of an offen
was a mere
crime. On
Burke wou
having in h
knowing th
false: R.
executory c

The two
through the
false preter
feit money
use it in a
vented him

In the ca
Burke sup
commit a c
have been

Hence, a
in the fur
part. The
stances, by
thirty-eigh

It has b

not lawfully be convicted of the conspiracy charged in the information, unless the evidence establishes the fact that the purpose thereof was a criminal purpose within the statute.

The only evidence before us of the alleged conspiracy or its purpose, is the acts of defendants in obtaining money from Burke.

Hence, if those acts constitute an offense within the provisions of section thirty-eight of the statute, the evidence is sufficient to support the charge of conspiracy as contained in the information, otherwise not. We are to inquire, therefore, whether the acts of the defendants, as proved on the trial, would support a conviction on an information against them, under the statute, for obtaining money of Burke by false pretenses.

The fifteen dollars first paid by Burke to the defendant C. Crowley, was paid on an executory contract between them, that the latter should procure for Burke a quantity of counterfeit money for circulation. There does not seem to be any element of an offense, under section thirty-eight, in this transaction. It was a mere executory contract of sale, the breach of which is no crime. On the contrary, had the contract been performed, Burke would have been guilty of a criminal offense, to wit, of having in his possession counterfeit money or evidences of debt, knowing the same to be counterfeit, with intent to utter it as false: R. S., ch. 167, sec. 5. It were better, therefore, that the executory contract be broken than kept.

The two sums of twenty dollars and twenty-five dollars, paid through the express company, were obtained from Burke on the false pretense that the boxes received by him contained counterfeit money. Had he obtained what he expected he intended to use it in a criminal manner. The false pretenses, therefore, prevented him from committing such crime.

In the case of the fifty dollars paid to the defendant Carnahan, Burke supposed he was bribing Carnahan, with that money, to commit a crime; and had this supposition been true, Burke would have been *particeps criminis* therein: R. S., ch. 167, sec. 22.

Hence, all the money obtained from Burke was paid by him in the furtherance of criminal motives and intentions on his part. The money having been obtained under such circumstances, by false pretenses and tokens, is the case within section thirty-eight, before cited?

It has been held in New York, where the same statute is in

force, that false pretenses of that character are not within the statute, and not punishable criminally. In *McCord v. The People*, 46 N. Y., 470, it is said *per curiam*, that "the prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if, in attempting to do this, he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offense.

"Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who for honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods."

So also in *The People v. Stetson*, 4 Barb., 151, Mr. Justice Welles, delivering the opinion of the court, says: "In all the numerous reported cases under the English and American statutes to prevent the obtaining money, etc., by false tokens or pretenses, I have not found one which was held to be within the statute, in which the transaction on the part of the person injured would not have been lawful, provided the representations or pretenses were true, nor where such representations or tokens, if true, were not in violation of law. I cannot believe the statute was designed to protect any but innocent persons, nor those who appear to have been in any degree *particeps criminis* with the defendant. To determine what attitude he occupies in that respect, it should be assumed that all the representations made to him, whether in words or tokens, were true; because it is an essential ingredient of the case that L. believed them to be true; otherwise he could not claim that he was influenced by them. Looking at his conduct in that light, and with that assumption, if, in parting with his money or property or yielding his signature, he was himself guilty of a crime, it cannot be that he is within the protection of the statute. Testing the case under consideration by these rules, it is impossible, in my opinion, to sustain the indictment. Barlow believed that the defendant was a constable, and had a warrant against him for a rape. He is chargeable with knowledge that the law forbade any settlement or compromise of the matter, and that it would be a misdemeanor

in the defense
ing to cheat
watch."

In *The People* refers to the statute of showing the "Whereas" gate way of devices, frauds, wares and families, and to the preamble of the protection of the people, and the protection

The doctrine principle by of the court *Harris*, 22 Cush., 571. the former,

Rex v. Stetson 549, illustrating case. The prosecutor of the Ellenborough fore, to depose as an injury instead of being guilty of

In Jacob conspiracy when two of to another, between di in execution is executed declared by or promises cious, as for

in the defendant to neglect to execute the process. In attempting to cheat the law, he has himself been defrauded of his watch."

In *The People v. Clough*, 17 Wend., 351, Mr. Justice Cowen refers to the preamble of the act of 30 Geo. II., ch. 24, of which the statute of New York and our own are substantially copies, as showing the reason and scope of those statutes. It is as follows: "Whereas divers evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats and devices, fraudulently obtained divers sums of money, goods, wares and merchandise, to the great injury of industrious families, and to the manifest prejudice of trade and credit." This preamble goes to show that the law was originally enacted for the protection of trade and credit, and of honest and industrious people, and not (in the language of *McCord v. The People*) "for the protection of rogues in their dealings with each other."

The doctrine of the above cases was vigorously assailed upon principle by Mr. Justice Peckham, dissenting from the decision of the court in *McCord v. The People*, and he cited *Com. v. Harris*, 22 Pa. St. (10 Harris), 253, and *Com. v. Morrill*, 8 Cush., 571. It must be conceded that these cases, particularly the former, sustain his views.

Rea v. Stratton, cited in a note to *Buck v. Buck*, 1 Campb., 549, illustrates the same principle, and is directly in point in this case. The indictment was for a conspiracy to deprive the prosecutor of the office of secretary of an illegal company. Lord Ellenborough said: "This society was certainly illegal. Therefore, to deprive an individual of an office in it cannot be treated as an injury. When the prosecutor was secretary of the society, instead of having an interest which the law would protect, he was guilty of a crime."

In Jacob's Law Dictionary the essential elements of a criminal conspiracy are thus stated: "Confederacy (*confederatio*) is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false confederacy between divers persons shall be punished, though nothing be put in execution. But this confederacy, punishable by law before it is executed, ought to have these incidents: First, it must be declared by some matter of prosecution, as by making of bonds, or promises, the one to the other; secondly, it should be malicious, as for unjust revenge; thirdly, it ought to be false, against

an innocent; and lastly, it is to be out of court, voluntarily: *Terms de Ley*, 158." In the present case, the confederacy or conspiracy charged in the information is punishable by law before it is executed, and hence is within the above rule. As already observed, the proofs show that it is not "*false, as against an innocent.*"

After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases is supported by the better reasons, as well as by the weight of authority, and that it is our duty to adopt it. We do so with hesitation, because able judges and courts have held a different rule; and with reluctance, because the acts of the defendants (or some of them), as disclosed by the evidence, were outrageous and indefensible, and the perpetrators richly merit punishment. But it is far better that they should escape punishment under this information than that sound legal rules should be disregarded to meet the supposed exigencies of a particular case.

It may further be observed (although not essential to the determination of the question under consideration), that had Burke exercised common prudence and caution, he could not have been misled by the false pretenses by which he was induced to pay the money to *Carnahan*. He had in his possession the box which the latter charged contained counterfeit money, and, by an examination of its contents, could readily have ascertained whether the charge was true. The cases cited by the counsel for the defendants abundantly show that such a case is not within the statute.

It follows, from the foregoing views, that the second question submitted by the learned circuit judge for our determination must be answered in the negative.

The case must be certified to the circuit court with these answers to the questions reported, and with the direction that that court proceed in accordance with our decision.

By the court—It is so ordered.

ESCAPE

It is error to
On the trial o
custody is
today. Th
to enable
make the
It is error to
or that if
dict of gu
Custody by a
illegal if
reasonabl
instructio
conveyin
Cruel treatme
is eviden
bona fides
Custody volu
lawfully
cially if t
To make the
not be po
it, or is g
Actual guilt
out warn
therefore
convictin
is not ot
lawfulne
ation of

CRIMINAL

rant. Evi
court, May
Habersh
(name unk
Lawrence
not guilty
case:

On the
clerks, Ba
which com

HABERSHAM v. STATE.

(56 Geo., 61.)

ESCAPE: *Charge—Legal custody—Jury as judges of the law.*

It is error to charge the jury that they are in no sense judges of the law.

On the trial of a prosecution for aiding to escape from custody, the fact of custody is for the jury, and so, also, is the legality of that particular custody. The court should acquaint the jury with the needful rules of law to enable them to distinguish legal from illegal custody, and let them make the application thereof to the facts in evidence.

It is error to charge that the custody was legal if the state's evidence is true, or that if the jury believe the evidence for the state they must find a verdict of guilty.

Custody by a private person after a legal arrest without warrant, becomes illegal if protracted for an unreasonable time, and whether the time was reasonable or unreasonable is a question for the jury, under proper instructions from the court as to the promptness which the law exacts in conveying the party arrested before a magistrate.

Cruel treatment of his prisoner by the captor may be considered (where there is evidence on the point) to illustrate the purpose of the arrest and the *bona fides* of the custody.

Custody voluntarily assumed by a private person without warrant, may be lawfully terminated with his consent, by turning the prisoner loose, especially if the latter be not guilty.

To make the violation of a lawful custody criminal, its legal character need not be positively known to the offender, if he has good reason to believe it, or is grossly negligent in the use of means to inform himself.

Actual guilt of the person held in custody for felony by a private person without warrant, is not indispensable to the legality of the custody, and, therefore, neither his conviction nor his prosecution is a prerequisite to convicting another for assisting him to escape. The question of his guilt is not otherwise involved than as throwing light upon the motive and lawfulness of his arrest, but for that purpose it is open to the consideration of the jury.

CRIMINAL LAW. Escape. Arrest. Charges of court. Warrant. Evidence. Before Judge Tompkins, Chatham superior court, May term, 1875.

Habersham was indicted for the offense of assisting a prisoner (name unknown to the jurors) to escape from the custody of Lawrence Banks and Chatham Rodgers. The defendant pleaded not guilty. The evidence made, in substance, the following case:

On the night of June 13th, 1875, at about one o'clock, two clerks, Banks and Rodgers, by name, arrested a boy in the house which connected with the store in which they were employed.

They state that this boy, with some other person who ran off, broke into the house with the view of passing thence into the store; that they only struck him for the purpose of overcoming his resistance when it was sought to arrest him; that the boy had a sack over his head, with holes for his eyes cut in it.

After his arrest he was tied, and, according to the evidence of the defendant, whipped twice. Rodgers sat up with him all night. In the morning Banks went to tell the proprietors of the store what had occurred. During his absence, according to the testimony of the state, at about eight o'clock, defendant untied the boy and took him away from Rodgers. Defendant said he would take upon himself the responsibility of releasing him. Rodgers said the boy had broken into the house. Defendant said that he was a constable and knew the rules of law. Rodgers did not resist defendant, as he was afraid of him. There had been a storm on the previous evening at about nine o'clock.

The boy, whose name was subsequently discovered to be Solomon Weaver, testified that he went through open doors into the house for the purpose of avoiding a storm; that he went into a closet and went to sleep; that he entered before the shop was closed; that when discovered he was shot at, arrested and whipped; that when defendant came in the morning he gave him this account of the transaction; that Rodgers then told the defendant to turn him loose, which defendant did; that he immediately gave himself up, knowing he had done nothing wrong.

Defendant stated that on the night of June 13th he was up very late, and in passing the house which had been broken into he heard some one crying; that he peeped into the house and saw a boy tied; that he got up at twenty-five minutes after nine o'clock A. M. and saw a crowd in front of the store; that he went down there and saw this boy, who gave him his account of the trouble he was in, saying that Rodgers had whipped him for coming in and sheltering himself from the storm; that he turned him loose, telling Rodgers that he had no right to whip him; that he turned the boy loose by consent of Rodgers, who said he did not wish to have the boy dealt with by law, but would give him a few stripes.

The jury found the defendant guilty. A motion was made for a new trial, upon the following grounds, to wit:

1st. Because the court erred in charging the jury that they

could find d
to have esca

2d. Beca
in no sense,
from the cou

3d. Beca
judges of th
person was l

4th. Bec
legal if the c

5th. Bec
exclusive ju
legal or not
closed.

6th. Bec
believed fro
an unreason
legal, and th

7th. Bec
not consider
the time he

8th. Bec
jury believe
defendant to
ant guilty.

9th. Bec
jury could
from the ev
offense.

10th. B
making up
whether the
but that if
the state di
of any burg
state, they

The moti
J. V. R.
A. R. L
state.

could find defendant guilty notwithstanding the person claimed to have escaped had never been prosecuted.

2d. Because the court erred in charging that the jury were, in no sense, judges of the law, but must receive the law as given from the court as law.

3d. Because the court erred in charging that they were not judges of the fact as to whether the custody of the escaped person was legal or not under the circumstances.

4th. Because the court erred in charging that the custody was legal if the evidence adduced for the state was true.

5th. Because the court erred in charging that it was the exclusive judge of the question as to whether the custody was legal or not in this case, under the circumstances and facts disclosed.

6th. Because the court refused to charge that if the jury believed from the evidence that the holding of the boy was for an unreasonable time after his arrest, then the custody was not legal, and they must acquit.

7th. Because the court erred in charging that the jury could not consider the fact that the boy was being cruelly treated at the time he was released.

8th. Because the court erred in refusing to charge that if the jury believed that Rodgers, who had the boy in custody, told the defendant to turn him loose, then they could not find the defendant guilty.

9th. Because the court erred in refusing to charge that the jury could not find the defendant guilty unless they believed from the evidence that he knew the boy was held for a criminal offense.

10th. Because the court erred in charging the jury that, in making up their verdict, they could not consider the question whether the boy had or had not been guilty of a criminal offense; but that if the boy was in custody of Rodgers, as the evidence of the state disclosed, although he may have been perfectly innocent of any burglary, still, if the jury believed the evidence for the state, they must find the defendant guilty.

The motion was overruled and the defendant excepted.

J. V. Ryals, by brief, for plaintiff in error.

A. R. Lamar, solicitor-general, by *W. G. Charlton*, for the state.

BLECKLEY, JUDGE: 1. Logically considered, the trial of a criminal case is an effort to complete a final syllogism, having for one premise, matter of law; for the other, matter of fact; and for the conclusion, the resulting proposition of guilty or not guilty. It is the duty of the judge to supply the jury with material for the major premise of this syllogism; and it is the duty of the jury to collect from the evidence the minor premise, compare the two, draw the conclusion, and declare it in their verdict. Inasmuch as it is possible for the judge to mistake the law or misrepresent it, the material which he supplies or some part of it, may be erroneous. Are the jury, nevertheless, to accept it as correct, or is it subject to their revision and correction? May they, if they think it faulty, reject it, and substitute in its place something corresponding to their own convictions of what the law really is? Are the scriptures of the law an open bible; or must they be read for the laity by the priesthood of the bench? The power of overruling the judge's charge, apparently conceded to the jury by this court in most of the cases (see Hopkins' Annotated Penal Laws, section 1602), prior to Brown's case, reported in 40 *Georgia Reports*, 689, is in the latter denied; and, by several later adjudications, the doctrine of Brown's case has become the established rule of decision. See 41 *Georgia Reports*, 217; 49 *Ibid.*, 485; 52 *Ibid.*, 82, 290, 607.

It is, perhaps, too late for a single member of the court to urge his individual conviction that Brown's case was an "innovation." The learned judge who delivered the opinion of the court in that and in some of the subsequent cases cited above has declared that it was not an innovation, that it was opposed to previous *dicta* only, not to previous decisions. He thought the true principle of the former cases was preserved. Acquiescence in that view would, probably, at this late day, be the better line of judicial conduct for any of his successors who might be of a different opinion. The now current holding is, in effect, that, to the jury, the highest and best evidence of what the law is, is the charge of the court; indeed, that their only final access to the law is through this charge. And it is maintained that, in order to judge of the law, it is in no wise necessary that the jury should be invested with power to revise the charge and correct it. As the judge is the organ of the law itself, through whom is made known to the jury what the law is, they are to receive it as he lays it down, and not discredit him as a legal authority. In

judging the
not upon v
understand
application
from compl
jury hear
the facts
charge con
ent law, th
they cannot
tively to t
lished by a
know the
that the ju
law and to
the law as
judge of it
abandoned
be judges
If we mus
to hesitate
of conform
seen, howe
be reconcil
without h
what is de
is at libert
vouched as
law to giv
law contain
deny the c
true mean
the case in
2. In t
judge and
range, as
separation
jury is to
the case.
custody a
illegal cus

judging the law they are to pass upon what it is in the charge, not upon what it is out of the charge; and coming thus to an understanding of it, are to determine what is its right and proper application to the facts in evidence, and what conclusion results from combining the two elements of law and fact. When the jury hear the charge, understand what it means, and apply it to the facts before them, they have judged of the law which the charge contains; and, as they have no proper access to any different law, there is, for them, no different law on the subject, and they cannot correct the errors of the judge if they would. Relatively to the jury, the charge stands like a volume of law published by authority—the only volume so published of which they know the contents. But none of the cases hold, or even hint, that the jury are in no sense judges of the law. If to judge the law and to follow the charge be incompatible, that is, if to accept the law as registered in the charge, be a surrender of the right to judge of it, then the theory that the charge is binding must be abandoned, for the statute expressly declares that the jury shall be judges of the law as well as of the fact: *Code*, section 4646. If we must give up one or other of the two things, it is in vain to hesitate; the right to judge must be preserved, and the duty of conforming to the charge be no longer exacted. We have seen, however, that the two branches of the rule are believed to be reconcilable; that is, that the jury may be judges of the law without having the right to contradict the court or to reject what is delivered as law from the bench. No tribunal whatever is at liberty to refuse to recognize as law what comes to it duly vouched as such by the highest instrumentality appointed by the law to give it assurance. If otherwise, a court, in judging of the law contained in the constitution of the United States, might deny the contents to be law, instead of merely finding out the true meaning of the instrument and applying that meaning to the case in hand.

2. In the foregoing presentation of the relative functions of judge and jury, the subject has been contemplated in its widest range, as embracing an entire case; but the like principle of separation between the province of the judge and that of the jury is to be observed in dealing with any given subdivision of the case. Thus, an essential part of the offense before us is the custody alleged to have been violated. Was it a legal or an illegal custody? How are the two classes to be distinguished?

By certain variations in the attendant circumstances. What circumstances will bring this particular custody within the class legal, and what will bring it within the class illegal, are questions of law; but the actual presence or absence of one set of circumstances or the other, in the particular instance, is matter of fact. Legal custody or illegal custody is, therefore, a conclusion consisting of law and fact blended; just as guilty or not guilty is a conclusion composed of the like elements. As both conclusions are of the same nature, the processes of arriving at them are similar. The law element is the material for the major premise in a special syllogism touching custody, and is to be supplied by the judge. The jury are to collect from the evidence the minor premise, compare the two, and draw the conclusion of legal custody or illegal custody. As the judge can decide no question of fact, he is not permitted to declare whether the particular custody disclosed by the evidence belongs to the one class or to the other. He, as the organ of law, can carry his voice no farther than the law goes. He can say, as the law does, that such and such custody is legal, and such and such illegal; but he cannot say that this particular custody was such or such, for that depends not on the law, but on the evidence. Of course, too, the bare fact of whether there was any custody at all, is, also, for the jury, unless it is admitted.

3-8. The remaining points are distinctly ruled in the head-notes, and will be fully understood when read in the light of the reporter's statement.

Judgment reversed.

NOTE.—For a very thoughtful and satisfactory discussion of how far the jury, in a criminal case, are to be considered judges of the law, see *Hamilton v. People*, 29 Mich., on p. 180.

In *Hamilton v. People*, 29 Mich., 173, the trial judge had been requested to charge that the jury were "paramount judges, both of the law and the facts," on criminal trials for felony. This instruction was held properly refused. The Supreme Court decides substantially that the jury are bound to accept and act upon the law as laid down by the court, "unless they should receive such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just." The intimation of the court is that in such a case the jury would be morally, if not legally, justified in disregarding the instructions.

In *Com. v. Porter*, 10 Metc. (Mass.), 263, this matter received a very exhaustive consideration, and all the authorities may be found collected in the report of that case. The opinion of the court was delivered by C. J. Shaw. It was held to be the duty of the jury to act upon the law as given them by the court,

and this without
sel for the def
tion was rever
dent this pri
conceive what
allowed to arg
ment, even th

The constitu
the jury shall
vision does no
therefore, tha
on that questio

In the Unit
from the cour
240; *U. S. v.*

The genera
Pierce v. State
although the
of the court, i

In Indiana
and the fact, h
Carter v. State
and it was hel
and that the j
any other lega

Through al
law in crimina
might arise in
laid down by

It may be co
right, but rest
and ought to,
never to be ex
only practical

The circuit co
A conviction
"fighting
the circuit
The two o

APPEAL 1
On Decem

and this without any qualification whatever. But it was also *held* that counsel for the defendant had a right to argue the law to the jury, and the conviction was reversed because the trial court had denied counsel for the respondent this privilege. The two rulings seem inconsistent. It is difficult to conceive what benefit it can be to the respondent that his counsel should be allowed to argue the law to the jury, if they are to pay no regard to the argument, even though it should succeed in convincing their minds.

The constitution of Maryland provides that "in the trial of criminal cases the jury shall be judges of law as well as of fact." It is *held* that this provision does not permit a jury to consider the constitutionality of a law, and, therefore, that the court properly prevented counsel from addressing a jury on that question: *Franklin v. State*, 12 Md., 236.

In the United States courts the doctrine that the jury must take the law from the court, in criminal cases, is well settled: *U. S. v. Battiste*, 2 Sumner, 240; *U. S. v. Morris*, 1 Curtis C. C. R., 23; *U. S. v. Riley*, 5 Blatchf., 204.

The general question is very elaborately and exhaustively considered in *Pierce v. State*, 13 N. H., 536, and here also the conclusion is reached that although the jury in criminal cases have the power to disregard the charge of the court, it is, nevertheless, their duty to receive it as law.

In Indiana it was said that in criminal cases the jury are judges of the law and the fact, but it is their duty to believe the law as laid down by the court: *Carter v. State*, 2 Ind., 617. But in a later case this doctrine was rejected, and it was *held* that counsel had a right to argue questions of law to the jury, and that the jury should judge of the constitutionality of a law as well as of any other legal question involved in the issue: *Lynch v. State*, 9 Ind., 541.

Through all the cases which deny the right of the jury to determine the law in criminal cases, there seems to run a tacit concession that an occasion might arise in which it would be proper for a jury to disregard the law as laid down by the court.

It may be compared to the right of rebellion. It can never be called a legal right, but rests upon considerations of natural justice, which sometimes do, and ought to, override municipal law. It is a sort of revolutionary right, never to be exercised except in extreme cases, and then only when it is the only practicable mode of securing justice.

STATE v. SLY.

(4 OREG., 277.)

PRACTICE: *Auterfois convict — Jurisdiction.*

The circuit court has jurisdiction of the crime of assault and battery.

A conviction under a city ordinance for "disturbing the peace," or for "fighting in the streets," cannot be pleaded in bar to an indictment in the circuit court for the assault and battery committed at the same time. The two offenses are not identical.

APPEAL from Jackson county.

On December 20th, 1870, Thomas Sly was tried and convicted

before the recorder of Jacksonville, for the offense of disturbing the peace, by fighting one John Pelling in the public street, in violation of a certain duly adopted ordinance of said city. He was fined ten dollars, which fine, together with the costs, he paid. Afterwards, at the November term of the circuit court of the state of Oregon for the county of Jackson, he was indicted for an assault and battery—the indictment charging that on December 20th, 1870, he did assault and beat one John Pelling. Upon this indictment he was convicted and fined in the sum of ten dollars. From said judgment of conviction Sly appeals.

B. F. Dowell and *John Kelsay*, for appellant.

J. R. Niel, district attorney, and *J. H. Stinson*, for respondent.

By the COURT, McARTHUR, J.:

The question as to the jurisdiction of the circuit courts over the crime of assault and battery must, we think, be answered in the affirmative. Section 537 of the criminal code which took effect from and after May 1st, 1865, made the crime of assault and battery indictable in the circuit courts, and punishable by imprisonment in the county jail not less than three months, nor more than one year, or by fine not less than fifty nor more than five hundred dollars: B., § 2, subd. 2 (code of procedure in justices' courts, ch. 1, § 2) of the act regulating the civil and criminal procedure in justices' courts, which act went into operation May 1st, 1865, jurisdiction of the crime of assault and battery, not charged to have been committed with intent to commit a felony, was also given to the justices' courts. The jurisdiction was, therefore, concurrent in all cases of assault and battery not charged to have been committed with intent to commit a felony. The sixth subdivision of the section last referred to, as amended in 1865, provided that in case of assault, and assault and battery, over which a justice's court had jurisdiction, the punishment should be by fine of not less than five nor more than fifty dollars. This amendment does not deprive the circuit courts of jurisdiction in this class of cases.

By virtue of the act of the legislature, incorporating Jacksonville, the common council was invested with the power to pass and enforce ordinances punishing any and all parties who might disturb the peace by fighting in the streets, and we are of opinion that the judgment of conviction of the offense of fighting in the streets, or disturbing the peace, pronounced by the recorder

under a city
in the circuit
same time.
self of the
of the office

Wilson v.

6 Dana (K

4 Black. C

same in lav

Commonw

referred to

regulation

criminal co

is *ex officio*

under the

assault and

He saw fit

him solely

however, th

case avail

subject to

Md., 331, v

the mayor

relieve the

analogous

liable to b

single state

state law (

14 How. U

Wallace, 1

It follow

affirmed.

NOTE.—W

that no man

must still be

conflicting an

culty occurs

convicted or

offense, arish

first tried is o

erly classed a

under a city ordinance, cannot be pleaded in bar to an indictment in the circuit court, for the assault and battery committed at the same time, for the reason, that before a defendant can avail himself of the plea of *autrefois convict*, he must show the identity of the offense and of the person (1 Chitty's Crim. Law, 462; *Wilson v. State*, 24 Conn., 57; *Duncan v. Commonwealth*, 6 Dana (Ky.), 295; *Commonwealth v. Wade*, 12 Pick., 496; 4 Black. Com., 336). The crimes, to be identical, must be the same in law and in fact (*Commonwealth v. Roby*, 12 Pick., 502; *Commonwealth v. Bubser*, 14 Gray, 84). The offenses above referred to are not identical. The one is a violation of a police regulation of the municipality, the other a violation of the criminal code of the state. Though the recorder of Jacksonville is *ex officio* a justice of the peace, and might have proceeded under the state law to punish the appellant for the crime of assault and battery, yet it very plainly appears that he did not. He saw fit only to exert his authority as recorder, and to punish him solely for the infraction of the city ordinance. Conceding, however, that the offenses are identical, that fact cannot in this case avail the appellant, for we deem the correct view of the subject to be that taken by the court in *Shafer v. Mumma*, 17 Md., 331, wherein it was held that the imposition of a fine by the mayor of a city in the exercise of his police power, will not relieve the offender from liability to the state. And this is analogous to the well settled doctrine which holds an offender liable to be doubly punished, by the United States and by a single state, for an act violative of both a law of congress and a state law (*Fox v. Ohio*, 5 How. U. S., 410; *Moore v. Illinois*, 14 How. U. S., 13; *Levy v. The State*, 6 Ind., 281; *Waldo v. Wallace*, 12 Ind., 569; *Gardner v. The People*, 20 Ill., 430).

It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

NOTE.—What offenses must be considered the "same" within the rule that no man shall be twice punished or put in jeopardy for the same offense, must still be considered a matter of considerable doubt. The authorities are conflicting and cannot be reconciled. The two points on which most difficulty occurs are these: 1. Whether a person who has been tried and convicted or acquitted of any crime, may afterwards be tried for a greater offense, arising on the same facts, and of which the offense for which he was first tried is one of the constituent parts? 2. Are all offenses which are properly classed as breaches of the public peace, such as assaults, batteries, affrays,

riots and aggravated assaults, to be considered so far similar that a prosecution for any of them shall bar a prosecution for any other of them, founded on the same transaction. The state has always the right, before a final trial is begun, to dismiss a prosecution and put the accused on trial for a higher offense. The accused has no voice in determining for what offense he shall be tried. When the state has once elected to put the respondent on trial for any crime, it ought to be concluded by that election to this extent at least—that the accused shall not be put in jeopardy again for a substantially similar offense, or for one of which the offense for which he is first tried is one of the constituent parts. Cases, however, where the same act may amount to two or more offenses distinct in their nature, and working mischiefs of entirely different characters, ought not to be confounded with those which fall within the operation of these rules.

The following are the principal American cases on these points:

In *State v. Cowan*, 29 Mo., 330, it appeared the defendant had been convicted of violating a municipal ordinance prohibiting furious riding through the streets and fined. He was afterwards indicted for the same act, under a state law prohibiting the running of horses at great speed on the public roads and highways. To this indictment he pleaded his former conviction under the municipal ordinance. The state demurred to the plea; the court sustained the plea, and, on appeal by the state, the Supreme Court sustained the judgment, and held the conviction under the ordinance a bar to the prosecution of the indictment.

In *State v. Thornton*, 37 Mo., 360, it was held that a conviction under a municipal ordinance punishing the keeping of a bawdy house, was a bar to a prosecution under a state statute for the same offense.

In *Com. v. Hawkins*, 11 Bush. (Ky.), 603, S. C., 1 Am. Crim. Rep., 65, on an indictment for an assault and battery, the respondent pleaded that he had been tried, convicted and fined for a breach of the peace, and that said conviction was for the identical facts charged in the indictment. On appeal from an order dismissing the indictment, the facts alleged in the plea being admitted to be true, it was held that the plea was good, and the former conviction a bar to the prosecution of the indictment.

In *Holt v. State*, 38 Geo., 187, to an indictment for an aggravated riot, the respondent pleaded a former acquittal of a charge of assault with intent to murder, and the identity of the offense. The plea was held good by the Supreme Court reversing the decision of the court below.

In *State v. Stanby*, 4 Jones L. (N. C.), 290, to an indictment for an assault and battery, the plea of a prior conviction of an affray, being the same transaction, was held good.

In *State v. Shepard*, 7 Conn., 54, a conviction of an assault, with intent to commit rape, was sought to be reversed, on the ground that the evidence showed that the respondent was guilty of rape, and if the conviction was sustained the respondent might subsequently be indicted for and convicted of the rape, and thus be twice punished for the same offense. The Supreme Court sustained the conviction, on the ground that an acquittal or conviction of assault, with intent to commit rape, was a bar to an indictment for rape on the same facts.

In *Com. v. Reely*, 12 Pick., 496, it is decided that a conviction for an assault with intent to commit murder cannot be pleaded in bar of an indictment for murder founded on the same facts.

In *U. S. v.* for an assault the riot.

In *Winning* tion was rev convicted of Supreme Co prosecutions riot consists that assault, commission conviction fo

In *Freelan* cution for ri assault and l laid down in

In *People* rape, the de the identity

In *Wilson* cannot be pl larceny, fou

In *People* the same co

In *State v.* glary with l larceny.

In *Jones v.* that an acqu indictment f

In *State v.* religious me transaction, was held goo

In *U. S. v.* acquittal be cannot be p founded on

In *U. S. v.* offense of k ation, is no house, supp

In *U. S.* sentence of sentatives, f the house, c are not a b battery.

In *State v.* for contempt indictment

In *U. S. v. Pence*, 4 Cranch C. Ct., 601, it is determined that a conviction for an assault and battery committed in a riot will not bar a prosecution for the riot.

In *Winger v. State*, 13 Ind., 540, a prosecution for a riot where the conviction was reversed because it appeared that the respondents had already been convicted of an assault and battery arising out of the same facts and fined, the Supreme Court lay down the rule as follows: "We think the true rule in prosecutions for offenses of this character is, that where the *gravamen* of the riot consists in the commission of an assault and battery, then a conviction for that assault, etc., would be a bar to a prosecution for the riot; but where the commission of an assault and battery was merely incidental to the riot, then a conviction for the one would not bar a conviction for the other."

In *Freeland v. People*, 16 Ill., 380, it was held that it was no bar to a prosecution for riot that the accused had been tried, convicted and fined for an assault and battery arising out of the same transaction. The same doctrine is laid down in *Scott v. U. S.*, 1 Morris (Iowa), 142.

In *People v. Saunders*, 4 Park. (N. Y.) Cr. Rep., 196, to an indictment for rape, the defendant pleaded a conviction for an assault and battery, alleging the identity of the offenses. The plea was held bad.

In *Wilson v. State*, 24 Conn., 57, it is decided that a conviction for larceny cannot be pleaded in bar of an indictment for burglary with intent to commit larceny, founded on the same transaction.

In *People v. McOloskey*, 5 Park. Cr. Rep. (N. Y.), on precisely similar facts, the same conclusion was reached.

In *State v. Warner*, it was held that an acquittal upon an indictment for burglary with intent to commit a larceny, does not embrace an acquittal of the larceny.

In *Jones v. State*, 55 Geo., 625, S. C., 1 Am. Crim. Rep., 570, it is decided that an acquittal of a charge of simple larceny may be pleaded in bar of an indictment for burglary, founded on the same transaction.

In *State v. Townsend*, 2 Harr. (Del.), 543, on an indictment for disturbing a religious meeting, a plea of former conviction of a riot arising out of the same transaction, the riot having occurred in a meeting-house, and during worship, was held good.

In *U. S. v. Cashiel*, 1 Hughes C. Ct. Rep., 553, it was determined that an acquittal before a court-martial, charging a violation of the articles of war, cannot be pleaded in bar of an indictment based on a United States statute, founded on the same transaction.

In *U. S. v. Hood*, 2 Cranch C. Ct., 133, it is decided that a conviction of the offense of keeping a furo-bank, contrary to a by-law of a municipal corporation, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence.

In *U. S. v. Houston*, 4 Cranch C. Ct., it is decided that a conviction and sentence of an individual, not a member of congress, by the house of representatives, for a breach of privilege by assault and battery upon a member of the house, on account of words spoken by the member in the house in debate, are not a bar to a criminal prosecution, by indictment, for the assault and battery.

In *State v. Yancey*, 1 Law Rep. (N. C.), 519, it is decided that a fine inflicted for contempt of court, in committing a battery in its presence, is no bar to an indictment for the same assault and battery.

the jury, with a recommendation that he be imprisoned for life. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and without evidence to support it, which motion was overruled by the court, and the defendant excepted.

1. The main evidence relied on to connect the defendant with the offense charged, was the fact that certain tracks were discovered near the house set on fire, the next morning thereafter, which were measured but not identified as the tracks of any particular individual. A day or two afterwards the defendant's tracks, as he made them in a public street, were measured, and the size thereof compared with the tracks found near the house set on fire. There were some other slight circumstances offered in evidence to show the defendant might be guilty of the offense charged, not, however, inconsistent with his innocence, but unless the tracks found near the house set on fire the next morning thereafter were made by the defendant the verdict cannot be sustained. How is that fact sought to be established? It is sought to be established by a comparison of the size of the tracks found near the house set on fire with the size of the tracks made by the defendant in a public street a day or two afterwards. The prosecutor, who measured the tracks found near the house, states that each one measured eleven inches in length from heel to toe, and three and one-fourth in width across the broadest part of it; that he measured the impression on the ground made by the sole only, both length and width. A witness who measured defendant's track states that it measured ten and three-quarter inches long, and between three and one-eighth and three and one-quarter inches wide; measured his shoes ten and a half inches long and three and one-quarter inches across.

The defendant may be guilty, but there is not sufficient evidence to authorize his conviction under the law, for it will not do to find a defendant guilty of an offense, and imprison him for life, on *suspicion* that he is guilty. This case comes within the ruling of this court in *McDaniel v. The State*, 53 Georgia Reports, 253, and *Farp v. The State*, 50 *Ibid.*, 513.

2. Besides, in this case, the motion for a new trial was not overruled by the judge who presided at the trial, so that we have not the weight of the opinion of the judge who did preside at the trial in favor of the verdict.

Let the judgment of the court below be reversed.

NOTE.—It has been determined by the Supreme Court of Michigan, in a number of cases which will be reported in 40 Mich., that where the trial judge dies or ceases to hold his office, parties who had a right to apply to him for a new trial, or who had motions for a new trial pending before him at the time of his death or removal, had an absolute right to a new trial. These decisions proceed upon the ground that only the judge who tried the case can properly decide a motion for a new trial where the application is to the discretion of the court, and that parties cannot, without fault or laches on their own part, be deprived of their appeal to this discretion.

STATE v. CARSON.

(66 Me., 116.)

EVIDENCE: *Cross-examination of respondent.*

Where the prisoner was on trial for the murder of one Brawn, and a witness in his own behalf; *held*, that on cross-examination it was not competent for the attorney for the state to ask him, against objection, "Did you assault Mr. Farrer on the Calais road, while drunk?" and similar questions as to assaults upon other parties while drunk, the matter not being relevant to his credibility as a witness, or competent as substantive evidence.

ON EXCEPTIONS. Indictment. The prisoner was tried for the alleged murder of Brawn on board a boat at Milford, on the Penobscot river, on the 16th day of July, 1874; and upon the trial the counsel for the defense contended that the parties Carson and Brawn were intoxicated at the time.

The prisoner was put upon the stand as a witness, and in the course of the cross-examination the following questions, against the objection of the prisoner's counsel, were allowed to be asked upon matters not inquired of in chief, and answers given:

Q. Did you assault Mr. Farrer on the Calais road, while drunk?

A. I do not remember making any assault on any body only in self-defense.

Q. Did you stab your brother William, while drunk?

A. I don't remember.

Q. Don't you remember whether you stabbed your brother William three or four times, while drunk?

A. No, sir.

Q. Will you say that you did not?

A. I do, sir.

Q. Did
while drunk

A. No, s

Q. Did

A. No, s

Q. Did

with a pisto

A. I pre

away, and g

they deserve

Q. Did

drunk?

A. I nev

made betwe

The verd

exceptions.

A. Know

H. M. P

LIBBEY, J

Brawn. He

had not put

examination

against obje

"Did you a

Similar ques

objection, a

times and

gone into in

nation legal

of two purp

ness, or as t

may be a w

ducted unde

tion of any

competent

other crime

competent

proper line

authorize, i

The witness

Q. Did you assault Mr. Fiske, of Exeter, the hotel-keeper, while drunk?

A. No, sir; not that I remember of, till he assaulted me once.

Q. Did you assault an old man there in Exeter, while drunk?

A. No, sir; never.

Q. Did you assault Thomas Jordan and Andrew Phnifer, with a pistol, while drunk?

A. I presume that they assaulted me, and I took their pistol away, and gave them what folks in Oldtown and Milford said they deserved.

Q. Did you assault Henry Wadleigh, in Oldtown, while drunk?

A. I never assaulted him any further than an agreement was made between us.

The verdict was guilty; and the prisoner's counsel alleged exceptions.

A. Knowles, for the prisoner.

H. M. Plaisted, attorney-general, for the state.

LIBBEY, J.: The prisoner was on trial for the murder of one Brawn. He was a witness in his own behalf. In his defense he had not put in evidence his previous good character. On cross-examination the counsel for the government was permitted, against objection duly taken, to ask him the following questions: "Did you assault Mr. Farrer on the Calais road, while drunk?" Similar questions were allowed to be put to the witness, against objection, as to assaults on several other persons, at different times and places, while drunk. These matters had not been gone into in the examination in chief. Was this line of examination legally permissible? It must have been admitted for one of two purposes: either as affecting the credibility of the witness, or as tending to prove the crime alleged. A party to a suit may be a witness. If a witness, his examination must be conducted under the same rules that are applicable to the examination of any other witness. To impeach his credibility, it is not competent to prove by other witnesses that he has committed other crimes than the one with which he is charged; nor is it competent to do the same thing by cross-examination. The proper line of cross-examination does not extend so far as to authorize, in that way, the introduction of incompetent evidence. The witness must be prepared to vindicate his general character

for truth, and to meet the proper evidence of a prior conviction of an infamous crime. These are matters properly at issue. But he cannot be required to be prepared to vindicate himself against any alleged crime that may be insinuated in the form of cross-examination, and of which he has no previous notice. We think these principles well settled by the authorities. The evidence was incompetent for the purpose of impeaching the credibility of the witness. The subject is carefully considered and determined in *Holbrook v. Dow*, 12 Gray, 357.

Nor was the evidence competent as tending to prove the crime for which the prisoner was on trial. The fact that he had made a violent assault on another person, at a different time and under different circumstances, could have no legitimate effect to prove him guilty of the fatal assault upon Brawn. In *Commonwealth v. Thrasher*, 11 Gray, 450, the court states the rule as follows: "As a general rule in criminal trials, it is not competent for the prosecution to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference of the prisoner's guilt of the particular act charged. The exceptions are cases where such evidence of other acts has some connection with the fact to be found by the jury, where such other fact is essential to the chain of facts necessary to make out the case, or where it tends to establish the identity of the party, or proximity of the person at the time of the alleged act, or the more familiar case, where guilty knowledge is to be shown or some particular criminal intent. Unless it be made material for some such reasons as we have stated, evidence of the substantive offenses of the like kind ought not to go to the jury."

The case at bar does not fall within any exception to the general rule. We think the court erred in allowing the questions to be put to the witness.

Exceptions sustained.

DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

NOTE.—The practice, under recent statutes, of allowing defendants in criminal cases to give evidence in their own behalf, has given rise to a number of questions on which the authorities are by no means uniform. The following are the most important decisions on these statutes:

In *McGarry v. People*, 2 Lans. (N. Y.), 237, *State v. Ober*, 53 N. H., 450, *Com. v. Mullens*, 97 Mass., 545, *Com. v. Morgan*, 107 Mass., 190, *State v. Wentworth*, 65 Me., 234, *State v. Fay*, 43 Iowa, 651, and *State v. Huff*, 11 Nev., 17, it was held, that the cross-examination of the defendant was not limited to the

matters concern
pelled to answer

In *Brandon v.*
on trial for having
arrested before

In *People v. A.*
pel a defendant
of certain offense
ground that the
nor, 97 Mass., 5

In Cooley's C
defendant in a
any point he c
which he decli
stances, they th
and overruled
against being c
becomes a snar
vides simply th
make a stateme
such statement
should not be u
answer any qu
on such a state
9 Mich., 221.
allow questions
had been arrest
decline to ansv

EVIDENCE: G

The good repu
never hear
and the fac
excellent c
character f

The accused h
traits invo
what it is

BERRY, J.
a rape. U
among other

matters concerning which he had testified in chief, but that he might be compelled to answer, on cross-examination as to any matter pertinent to the issue.

In *Brandon v. People*, 42 N. Y., 265, it was held that the defendant, who was on trial for larceny, might be asked this question: "Have you ever been arrested before for theft?" although she had not put her character in issue.

In *People v. Reinhart*, 39 Cal., 449, it was held that it was not error to compel a defendant to answer as to whether he had not been previously convicted of certain offenses, the objection to the questions not being based on the ground that the records of conviction were the best evidence. *Com. v. Bonner*, 97 Mass., 587, is to the same effect.

In Cooley's Constitutional Limitations, on p. 317, it is laid down that if a defendant in a criminal case chooses to testify, "he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." The Michigan statute is peculiar, and provides simply that any defendant in a criminal case "shall be at liberty to make a statement to the court or jury, and may be cross-examined on any such statement." Under this statute it has been held: 1. That the statement should not be under oath. 2. That the respondent could not be compelled to answer any question on cross-examination; and, 3. That a cross-examination on such a statement would not be allowed to go beyond it: *People v. Thomas*, 9 Mich., 221. And in *Gale v. People*, 26 Mich., 159, it was held to be error to allow questions to be put to the defendant as to whether, at various times, he had been arrested and in jail, although the court informed him that he might decline to answer such questions if he saw fit.

STATE v. LEE.

(22 Minn., 407.)

EVIDENCE: *Good reputation; what testimony is competent—Right to prove character from personal acquaintance.*

The good reputation of the accused may be proved by witnesses who have never heard his character discussed. Negative evidence is competent, and the fact that a person's character is not talked about at all is often excellent evidence that he gives no occasion for censure, and that his character is good.

The accused has a right to prove his real disposition and character (as to the traits involved in the case on trial) by the testimony of those who know what it is from their own personal observation.

BERRY, J. The defendant was indicted for the commission of a rape. Upon the trial, "the prosecuting witness testified, among other things, that the defendant, in the commission of the

offense charged in the indictment, committed a violent assault and battery upon her, and threatened to take her life, before he committed the alleged offense, and testified she was sure that the defendant was the person who committed the offense. The defendant testified in his defense that he did not commit the alleged offense, and was not present at the time it was committed, but was in another part of the city at the time, * * * and that he never saw the prosecuting witness * * * until several days after * * * she alleged the offense was committed."

The defendant called as a witness one Hopkins, who testified as follows: "Know defendant; first saw him nearly two years ago; he worked at the driving park in this county; I think I am acquainted with the defendant's general character for peaceableness." On preliminary cross-examination by the prosecuting attorney the witness testified as follows: "Never heard his character spoken of by any one before this transaction." On behalf of defendant the witness was asked the following questions, viz.: 1. "What was defendant's character as to peace and quietness?" 2. "What was defendant's disposition as to peace and quietness?" Both questions were excluded by the court upon objection by the prosecution.

Several other other witnesses were asked similar questions (also excluded), but none of them appear, from the testimony, to have been acquainted with the defendant's character for peace and quietness (using the word character in the sense of reputed character, or reputation), so as to qualify them to testify to the same, though some of them showed more or less knowledge of defendant's disposition. Defendant also proposed, in the language of the record, "to call other witnesses, who had been acquainted with defendant for about two years, but who had never heard his character, disposition or reputation discussed or spoken of, and to prove by them that his disposition for peace and quietness was good; also, that his character for the same was good, and also that his general reputation for the same was good; but the court held that neither of the above could be shown unless the witnesses would testify that they heard the defendant's character or disposition for peace and quietness discussed or spoken of."

By the strict and technical rule, as laid down by the text writers, the only evidence of his good character which an accused person is permitted to adduce upon his trial for a criminal offense

is evidence of
seldom enfor
Taylor Ev.,
Cr. Cas., 333
114; 1 Bish
able instance
reception of
the testimon
acquainted w
circumstance
was said abo
character—th
at all being,
dence that h
that his char
Heard Cr. C
enforcing the
we think the
and it must b
posed to ca
defendant fo
his bad reput
likely to hav
permitted to
in effect, th
spoken of.

This bring
ant's disposit
evidence as
position, and
would not b
the crime w
Regina v. R
Am. Cr. Law
ground that,
tion which w
crime, but up
of which ge
fact of dispo
no reason wh
knows what

is evidence of general repute. In practice, however, the rule is seldom enforced, but is, in fact, much and often relaxed: 1 Taylor Ev., § 325 *a*; *Regina v. Rowton*, 2 Bennett and Heard Cr. Cas., 333, *et seq.*, and note; *Gandolfo v. State*, 11 Ohio St., 114; 1 Bishop Cr. Prac., § 489. A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative evidence of good character—as for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and has never heard any remark about his character—the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or in other words, that his character is good: *Regina v. Rowton*, 2 Bennett and Heard Cr. Cas., 333; *Gandolfo v. State*, 11 Ohio St., 114. In enforcing the strict rule, without regard to this relaxation of it, we think the court below erred. The witness Hopkins testified, and it must be assumed that the witnesses whom defendant proposed to call would have testified, to an acquaintance with defendant for a considerable time, under circumstances in which his bad reputation (if such he had) would have been more or less likely to have come to their knowledge. They should have been permitted to testify negatively to his good character by testifying in effect, that they never heard his character discussed or spoken of.

This brings us to the offer of testimony in regard to defendant's disposition as to peace and quietness. The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit the crime with which he is charged: 1 Taylor Ev., § 325; *Regina v. Rowton*, per Earle, C. J., and Martin, B.; 1 Wharton Am. Cr. Law, § 635. This presumption does not rest upon the ground that, *in general repute*, the accused possesses a disposition which would render it unlikely that he would commit the crime, but upon the fact that he *possesses* the disposition—a fact of which general repute is only evidence. As it is, then, the *fact* of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general

repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition in question is from his own personal observation. If it could properly be objected that the latter kind of testimony would be matter of opinion, a like objection might be made to evidence of general repute as but an aggregation of opinions. But evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense. It is evidence of a fact—just as much evidence of a fact as is evidence of the disposition of a horse. Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient, or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both.

Judgment reversed, and the case remanded for a new trial.

STATE v. MOON.

(41 Wis., 684.)

LARCENY: *Evidence—Putting accused twice in jeopardy.*

In prosecutions for larceny, if the owner of the property alleged to have been stolen is known, and his attendance as a witness can be procured, his testimony that the property was stolen is indispensable to a conviction: *State v. Morey*, 2 Wis., 494.

In this case, the prosecution having failed to procure the attendance, as a witness, of the owner of the property alleged to have been stolen, or to show any effort to procure his attendance, and the secondary evidence of the fact, admitted by the court, being very weak and inconclusive, this court (to which the cause was certified after a verdict of guilty) advises the trial court that the evidence is insufficient to uphold the verdict.

Defendant, having been tried, and having been entitled to an acquittal on the evidence, cannot again be put in jeopardy of punishment for the same offense (Const., art. 1, sec. 8), and the trial court is therefore advised to arrest judgment and discharge him from custody.

CERTIFIED from the circuit court for Buffalo county.

Information for a larceny. The case is stated in the opinion.

The Attorney-General for the state, to the question discussed and determined by this court, cited *Rex v. Hazy and Collins*, 2 C. and P., 458; *Rex v. Allen*, 1 Moody, 154; *Plunkett's Case*,

3 City Hall 251; *State v. Yerg.*, 145.

There was

LYON, J.: the larceny committed in 18 The circuit judge's statute (R. Statute) committed for or

"Is the evidence tends to show she was taken to report the verdict case, it is unnecessary submitted.

The evidence the judge's remarks the mare in turned her over that the mare for her for a spring the de until 1869, a borne had brought an a The defendant's evidence at the

The defendant testified that the defendant's mare question, which days before, mare; and the rington and chase being the defendant.

Farrington that at the time is alleged he

VOL. II.

3 City Hall Rec., 137; *People v. Tilton*, 2 Wheeler's Cr. Cas., 251; *State v. Morey*, 2 Wis., 494; *Lowrence v. The State*, 4 Yerg., 145.

There was no argument here for the defendant.

LYON, J.: The defendant was indicted in the year 1871 for the larceny of a mare. The larceny is alleged to have been committed in 1865. In 1876 the defendant was tried and convicted. The circuit judge certified the case to this court, pursuant to the statute (R. S., ch. 180, sec. 8); and one of the questions submitted for our determination is the following:

"Is the evidence given on the part of the prosecution, which tends to show that the mare was stolen in fact—that is, that she was taken against the owner's consent—sufficient to support the verdict of guilty?" In the view we have taken of the case, it is unnecessary to consider or state the other questions submitted.

The evidence given on the trial is returned here as a part of the judge's report; and it appears therefrom that the owner of the mare in question, one Farrington, in the spring of 1865, turned her out in the highway, and allowed her to run at large; that the mare was missing soon after, and the owner made search for her for a time, but failed to find her; that during the same spring the defendant sold the mare to one Durisch, who kept her until 1869, and then sold her to one Paynborne; and that Paynborne had her until February, 1871, at which time Farrington brought an action of replevin for her, and prevailed in the action. The defendant lived about twelve miles from Farrington's residence at the time the mare was missing.

The defendant, and two other witnesses produced by him, testified that in the spring of 1865, Farrington came to the defendant's residence in search of a stray mare; that the mare in question, which had strayed in the defendant's premises a few days before, was pointed out to him, and he claimed her as his mare; and that thereupon the defendant purchased her of Farrington and paid him the agreed price—the object of the purchase being to secure a match for another horse owned by the defendant.

Farrington was not produced as a witness. The evidence is, that at the time of the trial he still resided where he did when it is alleged he lost the mare; but that he went to Kansas some

time during the preceding month, and had not returned when the trial took place.

The foregoing is all the testimony in the case showing, or tending to show, that the mare was taken without the consent of the owner, or that the attendance of the owner as a witness at the trial could not be procured.

In *State v. Morey*, 2 Wis., 494, it was held that in prosecutions for larceny, if the owner of the property alleged to have been stolen is known, and his attendance as a witness can be procured, his testimony that the property was taken from him without his consent is indispensable to a conviction. This upon the principle that his testimony is the primary and best evidence that the property was taken without his consent, and hence that secondary evidence of the fact cannot be resorted to until the prosecution shows its inability, after due diligence, to procure the attendance of the owner.

If the property be taken from the immediate possession of an agent or bailee of the owner, probably the testimony of such agent or bailee showing non-consent would answer the requirement of the rule. This, however, is not such a case.

In the present case, the secondary evidence of the non-consent of the owner is very weak. The prosecution failed to prove that he made the slightest effort to find his mare after the time the defendant and his witnesses testify that he sold her to the defendant, until he replevied her from Paynborne nearly six years afterwards; and the proof is, that during all that time she was kept and used within a few miles of the residence of the owner, and was frequently driven into his neighborhood, and sometimes past his residence.

Moreover, the prosecution has failed to show the slightest diligence to procure the attendance of the owner as a witness. It does not appear but that a simple request, either orally or by letter, would have secured his attendance. Had the case been continued for a term (and his absence after due diligence to secure his attendance would have been good cause for a continuance), it is quite probable that his attendance could have been procured. In short, it does not appear that the prosecution was unable to secure the attendance of the owner of the mare as a witness.

In view of the very weak and unsatisfactory character of the secondary testimony of the owner's non-consent, this seems a

very proper
Chief Justice
it does not
have been o
that the ma
admissible a
guilty. See
(4th Am. c
above questi

The defer
indictment,
would be to
same offense
right: Con
to arrest jud

NOTE.—The
case, in order
acquittal on th
in the case of
Gordon will b
volume of this

EVIN

W. was indicted
that J., a
made und
he directe
them. J.
and they p
W. had no
money cl
over by th
Held, it not be
the statem
blers and

At the Ju
Richmond,
\$150 of Un

very proper case for the application of the rule laid down by Chief Justice Whiton in *State v. Morey, supra*. And because it does not appear that the testimony of the owner could not have been obtained, we must hold that the secondary evidence that the mare was taken against the consent of the owner, if admissible at all, was entirely insufficient to uphold a verdict of guilty. See cases in Cowen and Hill's Notes to Phillipps on Ev. (4th Am. ed., by Edmunds), 635. We therefore answer the above question in the negative.

The defendant has been tried for the offense charged in the indictment, and was entitled to an acquittal. To try him again would be to put him twice in jeopardy of punishment for the same offense, which would be a violation of a great constitutional right: Const., art. I, sec. 8. Hence we advise the circuit court to arrest judgment and discharge the defendant.

NOTE.—The precedent made by the Supreme Court of Wisconsin in this case, in ordering the discharge of one who was entitled, on his trial, to an acquittal on the merits, has been followed by the Supreme Court of Michigan, in the case of *People v. Gordon*, decided at the April term, 1879. *People v. Gordon* will be reported in 40 Mich., now in preparation, and in the next volume of this series.

WILLIAMS v. COMMONWEALTH.

(27 Gratt., V.A., 907.)

EVIDENCE: *Confessions under promise — What competent.*

W. was indicted for stealing \$150, the money of S. On the trial it was proved that J., a detective, arrested W., who made a confession, which was made under promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, and told them what W. had said, and they paid over to J., for S., \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed with them. The balance of the money, \$46, was paid over by the father of W.

Held, it not being proved that the money paid to J. was the same lost by S., the statement of W. to J., and of what passed between J. and the gamblers and the father of W., is not competent evidence.

At the January term, 1876, of the hustings court of the city of Richmond, Reuben Williams was indicted for the stealing of \$150 of United States currency, the property of Peter Shields.

He was tried at the same term of the court, was found guilty, and sentenced to three years' imprisonment in the penitentiary.

On the trial the prisoner took two bills of exception to the rulings of the court. The first was to the admission of certain testimony offered by the commonwealth, and the other was the refusal of the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to the law and the evidence.

On the trial, after evidence had been introduced as to the loss of the money by Shields, and his employment of John Wren as a detective, and Wren had stated that the prisoner had made a confession, which the court excluded, the attorney for the commonwealth asked the witness Wren whether, in consequence of the statement of the prisoner, and in pursuance of his direction he took any action about the lost money and obtained it? To this question the prisoner, by his counsel, objected; but the court overruled the objection and allowed the question to be asked.

The witness then stated that, in pursuance of the direction and statement of the prisoner, he sent for four gamblers, who came to his office, where they paid him the sum of \$104; but that this was not the identical money that Shields lost; and that the other \$46, making the sum of \$150 which was stolen, were paid to Shields by prisoner's father. To this question and answer the prisoner excepted.

Upon the second exception the court certified the facts, which, it will be seen, includes the facts spoken of by the witness Wren, and objected to by the prisoner.

That on or about the 12th day of December, 1876, the prisoner and one Peter Shields and another occupied the same bedroom in the city of Richmond—all being stonecutters and working in the same yard; that there were other persons living in the same house; that on the night of that day the said Shields having received his pay, one hundred and fifty dollars in United States currency, deposited it in his trunk in an unoccupied room adjoining the bed-room, which room had two doors, one opening into the bed-room and another into a rear porch; that he locked his trunk; that about two weeks afterwards Shields went to his trunk and found that his money had been stolen, the trunk being still locked, having been opened with a false key; that on the day after Shields deposited his money in the trunk prisoner

remained in
gone to their
yard that day
chased a ne
some time w
work; that u
for the arres
Wren, who v
the purpose o
that John W
inducements,
he directed V
money from
Wren sent fo
said, and they
dred and fou
prisoner had
had lost the m
money, forty
fifty dollars s
the prisoner
present at the
and said he n
at the same ti
fifty cents *pe*

Upon the
awarded by th
G. D. Wise
The Attorn

MONCURE, P.
The court i
ruling the me
the ground th
The confessio
and to the co
properly exclu
But the tran
gamblers and
bill of excepti
no doubt upon

remained in their room after Shields and the other occupant had gone to their work ; that prisoner did not go to his work or the yard that day ; that on the evening of that day prisoner purchased a new suit of clothes, costing sixty-five dollars, and for some time was spending money very freely and neglecting his work ; that upon ascertaining his loss, Shields took out a warrant for the arrest of prisoner, and placed it in the hands of John Wren, who was appointed a special constable by the justice for the purpose of making the arrest of the prisoner on the warrant ; that John Wren arrested the prisoner, and having offered him inducements, the prisoner made a confession, in which confession he directed Wren to go to certain gamblers and get back the money from them ; that in pursuance of such instruction, John Wren sent for the gamblers named, told them what prisoner had said, and they paid over to him for Shields the sum of one hundred and four dollars, though one of them protested that the prisoner had not been in his house, and the others denied that he had lost the money claimed with them ; that the balance of the money, forty-six dollars, making the sum of one hundred and fifty dollars stolen, was paid over by the prisoner's father ; that the prisoner also made a confession to Shields ; that Shields was present at the interview between John Wren and the gamblers, and said he meant to prosecute them ; that prisoner was paid off at the same time Shields was, and he received three dollars and fifty cents *per diem*.

Upon the application of the prisoner, a writ of error was awarded by this court.

G. D. Wise and *S. Page*, for the prisoner.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the hustings court erred in overruling the motion of the prisoner to set aside the verdict upon the ground that the same was contrary to the law and evidence. The confessions made by the prisoner to the prosecutor Shields, and to the constable Wren, having been illegally obtained, were properly excluded by the court as being inadmissible evidence. But the transactions which occurred between Wren and the gamblers and the father of the prisoner, as set out in the second bill of exceptions, were admitted as evidence against the prisoner ; no doubt upon the ground which is thus stated in 1 Arch. Crim.

Prac. and Pl., p. 424, top 134 marg., that "even in cases where the confession of a prisoner is not received in evidence on account of its having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved; and in such a case the counsel for the prosecution is merely allowed to ask the witness whether, in consequence of something he heard from the prisoner, he found anything, and where, etc.; and the witness, in answer, can only give evidence of the fact of the discovery."

But the thing found, or the discovery made, in consequence of the confession, must be material in itself, and appear to have some connection with the crime or the charge, independently of the confession. The rule, and the reason of it is thus laid down in 1 Greenl. on Ev., § 231:

"The object of all the care which, as we have now seen, is taken to exclude confessions which are not voluntary, is to exclude testimony not probably true. But where, *in consequence of the information obtained from the prisoner*, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or *any other material fact is discovered*, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there."

"§ 232. If, in consequence of the confession of the prisoner, thus improperly induced, and of the information by him given, the search for the property or person in question *proves wholly ineffectual*, no proof of either will be received. The confession is excluded because, being made under the influence of a promise, it cannot be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession, may also produce groundless conduct."

The notes of Waterman to 1 Arch., *supra*, refer to many cases

having an im-
following cas-
for the prison-
151; *Jones's*
The State v.
seem to have
and yet they
They were d-
Griffin's Cas
two promises
be better for

Held, that
that the pris-
which he gav-
notes that ha-
the jury that
they might r-
panying the
stolen note;
the judges, t-
of them were

In *Jones's*
amount of o-
prisoner, on
taken out of
duced said, "
him that, he
prisoner took
had left of i

Held, that
The same ju-
the considera-
A majority o-
the evidence
Three of the

In *Jenkin*
stealing seve-
induced, by
and after th-
house, as an-
erty, and poi-

having an important bearing on this subject. And so have the following cases, some or all of which were cited by the counsel for the prisoner in this case: *Griffin's Case*, 1 Russell and Ryan, 151; *Jones's Case, Id.*, 152; and *Jenkins' Case, Id.*, 492. Also, *The State v. Due*, 7 Foster's R., 256. The first of these cases seem to have been decided on the same day by the same judges, and yet they seem to be somewhat in conflict with each other. They were decided at the Winchester Lent assizes in 1809. In *Griffin's Case*, a prisoner was charged with stealing a guinea and two promissory notes. The prosecutor told him that it would be better for him to confess.

Held, that after this admonition the prosecutor might prove that the prisoner brought him a guinea and a five-pound note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The judge, *Chambre*, told the jury that, notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note accompanying the act of delivering it up, as evidence that it was the stolen note; and they found the prisoner guilty. A majority of the judges, to wit, seven of them, held the conviction right; two of them were of a contrary opinion.

In *Jones's Case*, which was for the larceny of money to the amount of one pound eight shillings, the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but *before the money was produced* said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil, if he pleased." Upon which prisoner took 11s. 6ld. out of his pocket and said *it was all he had left of it*.

Held, that the confession ought not to have been received. The same judge, *Chambre*, left the whole of this evidence for the consideration of the jury, and they found the prisoner guilty. A majority of the judges present, to wit, five of them, held that the evidence was not admissible, and the conviction wrong. Three of them *contra*. Lord Ellenborough *dubitante*.

In *Jenkins' Case*, which was decided in 1822, the charge was stealing several gowns and other articles. The prisoner was induced, by a promise from the prosecutor, to confess his guilt, and after that confession he carried the officer to a particular house, as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it.

held that this evidence was incompetent, unless the bill should be identified by other evidence as one of those which had been stolen. This case, as well as Jones's and Jenkins', *supra*, seem to expound the law correctly. And now let us apply it as so expounded to this case.

Now, if the money delivered up by the gamblers and the father of the prisoner to the constable, Wren, had been proved by independent evidence, other than the confession of the prisoner, to have been the identical money confessed to have been stolen by him, then the fact that the stolen property was thus discovered, and that the prisoner's confession led to such discovery, would have been admissible evidence in the case according to the law as just expounded.

But so far from there being any independent evidence of identity of the money delivered up to the constable, it is not pretended that it was the same money that was stolen, as it almost certainly was not. And the gamblers denied that the prisoner had lost the money claimed with them; and one of them protested that the prisoner had not been in his house. The prosecutor was present at the interview between the constable and the gamblers, and said he meant to prosecute them. It does not certainly appear what for. Though it is probable that he meant, and they understood that he meant, for gambling; for they had been guilty of gambling, but do not appear to have been in any way implicated in the larceny. That such a menace to prosecute them for gambling, a highly penal offense, made at a time when there was a great effort to enforce the law against that offense, should have induced these gamblers to purchase an exemption from prosecution for it by paying up among them the sum of \$104, which they did under protest, is not at all strange, even supposing that they never won a dollar from the prisoner.

In regard to the balance of forty-six dollars paid to the constable by the prisoner's father, there is no evidence whatever that that was a part of the money stolen, or that any part of the money stolen went into the hands of the father, who may have paid that sum out of his own money to save his son from a criminal prosecution.

Then all this evidence in regard to money received from the gamblers, and from the father of the prisoner, together with the confession which led to its discovery, is illegal and inadmissible evidence, and must be excluded from the case, and being so

excluded there is, certainly, not enough in the case to warrant the verdict of the jury. For all the evidence then remaining in the case is, that the prisoner and another were room-mates of the prosecutor; that the prosecutor received \$150 for his work, and locked it up in his trunk, which he kept in an adjoining unlocked room, with two doors, one opening into their bedroom, the other into a porch; that about two weeks afterwards the prosecutor went to his trunk and found that his money had been stolen, the trunk being still locked, having been opened with a false key; that on the day after the prosecutor deposited his money in his trunk, the prisoner remained in his room after the prosecutor and another occupant had gone to their work (all the said occupants being stonecutters and working in the same yard); that the prisoner did not go to his work or yard that day; that on the evening of that day prisoner purchased a new suit of clothes costing \$65, and for some time was spending money very freely, and neglecting his work; and that upon ascertaining his loss, the prosecutor took out a warrant for the arrest of the prisoner and placed it in the hands of John Wren, who was appointed a special constable by the justice for the purpose of making the arrest of the prisoner on the warrant; that John Wren arrested the prisoner, and having offered him inducements, the prisoner made the confession which led to the transaction as aforesaid with the gamblers and the father of the prisoner.

Certainly this evidence, separate and apart from the said transaction and the said confession, which, as we have seen, are illegal and inadmissible evidence, can create no more than a mere suspicion of guilt in the prisoner, is altogether inconclusive, and is wholly insufficient to warrant the verdict of guilty against him, especially when considered in connection with evidence in the cause in behalf of the prisoner, that he received three dollars and fifty cents *per diem* for his wages, and was paid off on the same day with the prosecutor. Why may we not presume, in favor of innocence, that the \$65 he laid out in clothes, and the money he was spending very freely, was his own money? Certainly it was not the prosecutor's, according to the theory of the prosecution, which is, that his money, some of it, went to the gamblers, and the balance was deposited in the hands of the prisoner's father.

We therefore think the court erred in not setting aside the verdict and granting a new trial, as mentioned in the second bill

of exception
court erred
answer ment

Therefore
and the caus
conformity

SEDUCTION

In an action for
direct pro
raised on
lawfully b

In an action for
ties on the
whether it

Where the pr
told her t
allow cou
bearing on

In the examin
testified t
promise, I
talked to
jury, whi
rassment
and deter
defendant
would co
to charge
the trial,
him guilt

ERROR t
October 30

Seduction

Benj. P.

plaintiff in
the prosec
209; *Peop*
presumed:

of exceptions. We also think, for reasons already assigned, the court erred in not excluding from the jury the question and answer mentioned in the first bill of exceptions.

Therefore, the judgment of the hustings court is reversed, and the cause is remanded for a new trial to be had therein in conformity with the foregoing opinion.

LEWIS v. PEOPLE.

(37 Mich., 518.)

SEDUCTION: Proof that the seduced woman was unmarried—Evidence.

In an action for the seduction of a girl thirteen years old, the omission of direct proof that she was not married, the question not having been raised on the trial, was held unimportant. At that age she could not lawfully be married.

In an action for seduction, evidence of the conduct and appearance of the parties on the day following the alleged offense is relevant to help ascertain whether it had been accomplished by seductive means.

Where the prosecutrix, in a seduction case, has testified that defendant has told her that certain other girls allowed such liberties, it was proper to allow counsel for the prosecution to ask her their names, as evidence bearing on the means used in effecting the seduction.

In the examination preliminary to a prosecution for seduction, the prosecutrix testified that defendant had offered her no inducement and made no promise, but, on the trial, she testified that he had protested his love and talked to her of marriage. *Held*, that it was reasonable to caution the jury, which had an opportunity to observe her, to consider her embarrassment on the examination, and her youth and degree of intelligence, and determine whether she would have volunteered to tell all that defendant had said to her about love and marriage, and whether she would consider it as a promise unless her attention was called to it, and to charge them that if they were satisfied that she had told the truth on the trial, and that defendant had induced her to consent, they should find him guilty.

ERROR to Hillsdale. Submitted October 16th. Decided October 30th.

Seduction. The facts are in the opinion.

Benj. P. Shepard and Dickerman & St. John (on brief) for plaintiff in error. Conviction of seduction without proof that the prosecutrix is unmarried is error: *West v. State*, 1 Wis., 209; *People v. Kenyon*, 5 Park. Crim. Rep., 254. It cannot be presumed: *People v. Lambert*, 5 Mich., 349; *Shannon v.*

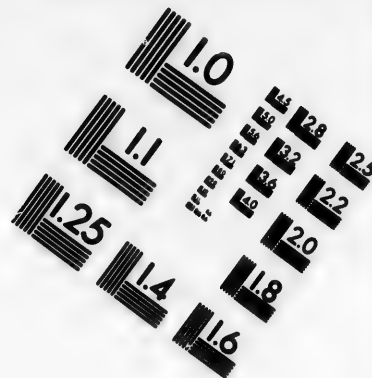
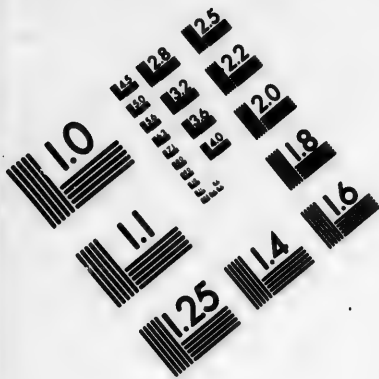
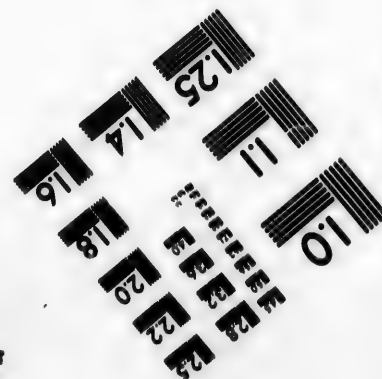
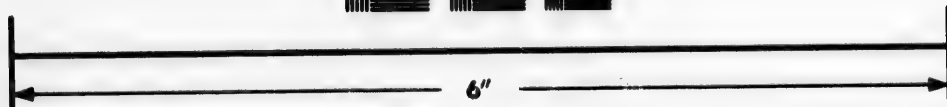
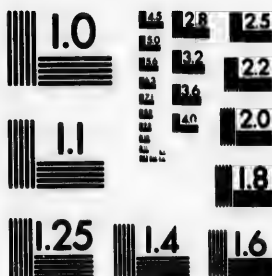


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 873-4503

1.4 1.8 2.5
1.6 2.0 2.2
1.8 2.0 2.2
2.0 2.2 2.5
2.2 2.5 2.8
2.5 2.8 3.2
2.8 3.2 3.6
3.2 3.6 4.0
4.0 4.5 5.0
5.0 5.5 6.0
6.0 6.5 7.0
7.0 7.5 8.0
8.0 8.5 9.0
9.0 9.5 10.0
10.0 10.5 11.0
11.0 11.5 12.0
12.0 12.5 13.0
13.0 13.5 14.0
14.0 14.5 15.0
15.0 15.5 16.0
16.0 16.5 17.0
17.0 17.5 18.0
18.0 18.5 19.0
19.0 19.5 20.0
20.0 20.5 21.0
21.0 21.5 22.0
22.0 22.5 23.0
23.0 23.5 24.0
24.0 24.5 25.0
25.0 25.5 26.0
26.0 26.5 27.0
27.0 27.5 28.0
28.0 28.5 29.0
29.0 29.5 30.0
30.0 30.5 31.0
31.0 31.5 32.0
32.0 32.5 33.0
33.0 33.5 34.0
34.0 34.5 35.0
35.0 35.5 36.0
36.0 36.5 37.0
37.0 37.5 38.0
38.0 38.5 39.0
39.0 39.5 40.0
40.0 40.5 41.0
41.0 41.5 42.0
42.0 42.5 43.0
43.0 43.5 44.0
44.0 44.5 45.0
45.0 45.5 46.0
46.0 46.5 47.0
47.0 47.5 48.0
48.0 48.5 49.0
49.0 49.5 50.0
50.0 50.5 51.0
51.0 51.5 52.0
52.0 52.5 53.0
53.0 53.5 54.0
54.0 54.5 55.0
55.0 55.5 56.0
56.0 56.5 57.0
57.0 57.5 58.0
58.0 58.5 59.0
59.0 59.5 60.0
60.0 60.5 61.0
61.0 61.5 62.0
62.0 62.5 63.0
63.0 63.5 64.0
64.0 64.5 65.0
65.0 65.5 66.0
66.0 66.5 67.0
67.0 67.5 68.0
68.0 68.5 69.0
69.0 69.5 70.0
70.0 70.5 71.0
71.0 71.5 72.0
72.0 72.5 73.0
73.0 73.5 74.0
74.0 74.5 75.0
75.0 75.5 76.0
76.0 76.5 77.0
77.0 77.5 78.0
78.0 78.5 79.0
79.0 79.5 80.0
80.0 80.5 81.0
81.0 81.5 82.0
82.0 82.5 83.0
83.0 83.5 84.0
84.0 84.5 85.0
85.0 85.5 86.0
86.0 86.5 87.0
87.0 87.5 88.0
88.0 88.5 89.0
89.0 89.5 90.0
90.0 90.5 91.0
91.0 91.5 92.0
92.0 92.5 93.0
93.0 93.5 94.0
94.0 94.5 95.0
95.0 95.5 96.0
96.0 96.5 97.0
97.0 97.5 98.0
98.0 98.5 99.0
99.0 99.5 100.0

10
01

People, Id., 71 A charge unwarranted by evidence is error: *Amer. Trans. Co. v. Moore*, 5 Mich., 368; *Hewitt v. Begole*, 22 Mich., 31; *Druse v. Wheeler*, 26 Mich., 200.

Attorney-general *Otto Kirchner* (on brief) for the people.

GRAVES, J. The plaintiff in error was convicted of having seduced and debauched one Alice Tiffany.

The act of intercourse, which was admitted, occurred at her father's house, where she resided, on the evening of July 23d, 1876.

At that time she was only three months above the age of thirteen years. Her mother had died some time before, and she, together with her sister Julia, some two years older, had the principal charge of some younger children. She was going to school, and, according to evidence called out by defendant's counsel, had previously been a constant attendant.

The first ground of error is that there was no proper proof that she was unmarried. There is an express statement in the bill of exceptions that all the evidence is given. There is some reason to think that this statement is inaccurate. At page sixty of the record, the defendant's counsel is represented as proposing to read some of the testimony taken by the reporter on a former trial, and the record then states that permission was given without objection. But the testimony does not appear.

Let it be assumed, however, for the present purpose, that all the evidence is given, and the mind is at once struck with the circumstance that no question was made in any form whatever at any time during the trial that the prosecutrix was unmarried.

The defense requested no charge on the subject, and never intimated or indicated that there was any intention to claim that she was or might have been a married woman, or any hint of a purpose to raise any controversy upon that point. From beginning to end the trial proceeded apparently upon a tacit understanding that no question of her being unmarried existed, and that no inquiry need be gone into in regard to it.

It is true the record contains no direct proof of the fact that she was unmarried; but the circumstances which appear, when received in connection with the fact that her being unmarried was treated at the trial, on all sides, as something too well known and certain to be noticed and inquired about, are sufficiently forcible to repel the charge of error.

Her personal history so far as shown, her extreme youth, the attitude and deportment of the defendant towards her, her position in her father's household, and the surrounding circumstances generally, afford very convincing evidence that she was a mere girl and unmarried. The negative evidence may not be overlooked.

Notwithstanding the nature of the case would naturally have directed attention to her having been married, if, in truth, she had been, and the fact would have been elicited, still there was not the slightest reference to any such thing. Finally, the law was in the way of her marriage. She was not of lawful age, and it would be going far to arbitrarily suppose she may have changed her condition through a violation of law. Upon all the facts and circumstances the jury must have found she was unmarried, and without stopping to see whether, in strictness, some direct proof would be generally required, the court is satisfied that this verdict ought not to be disturbed for want of it.

The point was not made below, and it is now too late to allege the lack of evidence direct in form, there being abundance of other evidence.

It was objected that no evidence could be given of the conduct and appearance of the prosecutrix and defendant on the day following that of the alleged act of intercourse. The objection was not well founded. Proper inquiry of that kind was relevant to ascertain, or help ascertain, whether the submission of the prosecutrix had been brought about by seductive means, and the inquiry was kept within due limits.

It was likewise objected that certain offers of proof by the prosecuting attorney, which, however, the court overruled, constituted error. This requires no comment. It is not pretended the court committed any fault whatever. The proposition presents no question of law.

The prosecutrix testified that, among other representations to induce her to yield, the defendant told her that certain of her young female school-mates allowed such liberties. In a previous stage of her testimony she had given the names of two of these young girls of whom he had thus spoken, without any objection, and she was at length asked to give the names of all. This was objected to. The objection has no force. The inquiry was originally proper as helping to explain the means used to accomplish the result, and having ascertained the names of two

out of three without objection, it was quite right to call for the third.

The fifth, sixth and eleventh charges of error merit no notice. They are plainly frivolous.

The ninth assignment is without any exception to support it. The tenth complains that the court refused to permit the witness Porter to relate to the jury his remarks on a former occasion in regard to the conduct of the prosecutrix. The point is absurd. The court was right.

Several assignments based on the charge, although not abandoned, are not much pressed. The points have been carefully examined, and they are not perceived to present any substantial or valid objection to the conviction. A particular discussion would be tedious, and is altogether uncalled for. Objection is made, however, to that part of the charge relative to the seductive means necessary to be shown, and to what was said about the age and situation of the prosecutrix, and in regard to her testimony before the examining magistrate.

It is argued that the judge assumed as proved some of the matters necessary to show that there were seductive means, and also improperly introduced considerations to lead the jury to accept the relation of the prosecutrix, rather than that of the defendant, as to whether the imputed means had any existence.

In view of this complaint we have very carefully scanned the instructions, which are too long to be introduced here, and do not find them justly exposed to the criticism passed upon them. There is no assumption of the existence of any expedient alleged to have been employed. On the contrary, the jury were given clearly to understand that it was for them to find whether or not the required means existed and were used.

It appeared that on the examination before the magistrate the prosecutrix had stated that no inducement was held out or promise made to her. In commenting on this, the judge observed to the jury as follows: "You are to consider the embarrassment under which she labored at the time, and her intelligence and her youth, whether she would consider it in the way of a promise. She stated very plainly that he didn't hold out any inducements to her, and that he didn't make any promises to her. The word marriage she thought was not mentioned at all. You are to consider now whether a girl situated as she was, with her tender years and embarrassed as she was, would

volunteer without being questioned—whether she would be likely to go on and tell all that was said about love and marriage, unless her attention was called to it. You are to consider that, gentlemen, and if you are satisfied that she told the truth in this court with regard to the love and marriage, and he induced her to consent to that intercourse, your verdict should be guilty.”

When this passage is considered in connection with the residue of the charge, and in the light of all the facts before the jury, and remembering that the jury had opportunity to observe the prosecutrix during her long examination on the stand, and were in a situation to enable them to form an opinion of her intelligence, and her liability to be embarrassed, it seems to the court that the judge did no more than his duty. The explanation and caution would seem to have been reasonable and well-timed, and we think the complaint against it is not justified.

The charge, as a whole, appears to have been fair, and we think the jury were not misled by it.

No error being shown, the judgment should be affirmed.

COOLEY, C. J., and CAMPBELL, J., concurred.

MARSTON, J., did not sit in this case.

NOTE.—For a full collection of all the authorities as to what constitutes the crime of seduction, see note to *People v. Clark*, 1 Am. Crim. Rep., 660.

BONKER v. PEOPLE.

(81 Mich., 4.)

SOLEMNIZATION OF UNLAWFUL MARRIAGES: *Cumulative testimony — Guilty knowledge, how proven — Guilty knowledge, erroneous charge as to — What witnesses must be called by the prosecution.*

The Michigan statute (Comp. L., § 4729) makes it a misdemeanor for one to solemnize a marriage, knowing that he is not lawfully authorized to do so, or that there is a legal impediment thereto. *Held*, to apply to marriages not authorized by law, as where the girl is under the age of consent.

Where a justice joined in marriage a girl who professed to be of the age of consent, although she was apparently not, it was *held* competent to show that his family and her father's were neighbors and acquaintances, and that at her marriage he did not inquire for her parents, who were not present. These facts tended to show that he knew the girl's age.

The rule requiring the prosecution to call every attainable witness, where testimony is needed to disclose any part of the transaction, is to prevent the

suppression of evidence, and does not make it always necessary to call all witnesses, particularly where their testimony would be only cumulative, or where it appears that they abetted the commission of the offense, and the offense is not a crime of violence.

When guilty knowledge is an ingredient of the offense, there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before engaging in a doubtful transaction.

The fact of guilty knowledge should be left to the jury to determine from all the circumstances.

But it seems that a charge that if the justice "had good reason to believe," or "if in the exercise of a reasonable discretion he had reason to believe" that the girl was under sixteen years of age, he is guilty, is erroneous.

ERROR to Wayne. Submitted April 10. Decided June 12. Criminal information, under the statute, against unlawful marriages. The facts are in the opinion. -

Moore & Moore, and J. L. Chipman, for plaintiff in error.
Otto Kirchner, attorney-general, for the people.

COOLEY, C. J. The defendant has been convicted on an information which charges that "heretofore, to wit, on the 28th day of February, A. D. 1876, at the township of Huron, in said county of Wayne, one William Bonker, late of said township, being then and there a justice of the peace of said township, and in and for said county, unlawfully did undertake to join in marriage Frank Bogart and Ann Eliza Davis, she, the said Ann Eliza Davis, being then and there a female under the age of sixteen years, to wit, of the age of thirteen years, and not capable in law of contracting marriage; and the age of the said Ann Eliza Davis being then and there a legal impediment to the said proposed marriage, he, the said William Bonker, then and there, and at the time he undertook to join the said Frank Bogart and the said Ann Eliza Davis in marriage, well knowing that the said Ann Eliza Davis was then and there a female under the age of sixteen years, contrary to the form of the statute, etc.

On the trial the main facts appear to have been undisputed. The girl was the daughter of one Daniel T. Davis, who lived in the same township with defendant, and the two had known each other for three or four years, and had had some business dealings of no great importance.

A part of that time they resided within a mile of each other, and the girls of the two families seem to have been acquainted. The girl testified that she had known defendant about four years,

and the record does not show that this fact was disputed by him. At the time of the marriage she was in the employ of one Hemstock, about forty rods from and in sight of her father's house. An arrangement was fixed up between Mr. and Mrs. Hemstock and Bogart for the marriage of the latter to the girl, and the defendant coming along in the road with one Nowland, Bogart went out and called him in to marry them. When he came in he asked the girl how old she was, and she replied sixteen.

Her testimony was that she made this statement under the instructions of the Hemstocks and Bogart, but they denied this. She was, in fact, but thirteen years of age. Without taking any precautions beyond this simple inquiry, and without the presence or knowledge of any of the girl's family, the defendant proceeded with the marriage ceremony. These facts, it must be conceded, make out a very gross case of abuse of official authority, and it remains to see whether any of the exceptions taken to the conviction can be supported.

I. It is claimed that the information makes out no case under the statute. The information was filed under section 4729 of the Compiled Laws, which provides that "if any person shall undertake to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be deemed guilty," etc. The argument on the part of the defendant is, that an "impediment" is that only which absolutely precludes a marriage being formed—such as relationship within the prohibited degrees, or a previous marriage not dissolved—and that as the marriage of a party under the age of consent would not be void, but only voidable, the want of age could not constitute an impediment. This argument would apply equally well to a marriage accomplished by fraud or force—such marriages being voidable only—and would protect the magistrate, though the facts were all known to him. We doubt the validity of the argument, and should be inclined to hold that whatever is in the way of a valid marriage must be understood to constitute such an impediment as the statute has in view. The statute authorizes certain marriages, and does not authorize others; it points out what shall prevent or impede them. But it is not necessary to rest the case upon this view, for when the statute does not authorize a certain marriage, a magistrate cannot be "authorized" to join the persons in marriage. The age of consent in a female is, by the statute, fixed at

sixteen years; and though the law, in view of the serious consequences that might follow from treating all marriages as void where one of the parties is under the age of consent, holds them to be voidable only, it, nevertheless, does not authorize them. Like a fraudulent marriage, they are unauthorized, for consent is the first requisite in marriage, and in these cases the capacity to consent is withheld by law.

II. Exception was taken to the admission of evidence to show that the families of defendant and Davis were acquainted, and that at the time of the ceremony defendant made no inquiry for the girl's parents. This evidence bore strongly on the probability of defendant's knowledge that his act was unwarranted, and we have no doubt was properly received. It tended to show that he must have had some knowledge of the girl's age, and it put before the jury the extremely suspicious circumstance that in the immediate vicinity of her father's house he was willing, without the presence, and, so far as he knew, the knowledge of her parents, to join in marriage a girl who, even if she were sixteen, would be unfit to act in so important a matter upon her own judgment.

III. The third exception was to the refusal of the court to require the prosecution to put upon the stand as witnesses for the people Mr. and Mrs. Hemstock, Bogart and Nowland. There was nothing in the case to indicate that Nowland could have given material evidence; it only appeared that he was in the road with defendant when the latter was called in, and that was no part of the *res gestæ*. The record discloses no fact that renders it at all material that defendant was called in by one person rather than by another, or what was said in calling him in or how he came to be present. The *res gestæ* began with his presence in the house. Evidence as to how or why he came to be there was proper as introductory or explanatory, but nothing depended on it. The claim that the others should have been called by the prosecution is made in reliance upon *Maher v. People*, 10 Mich., 212, and *Hurd v. People*, 25 Mich., 405.

One of these cases was an information for murder, and the other for an assault with intent to commit murder, and the principle deducible from them is that "the prosecutor in a criminal case is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other

part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed; especially if it appears to the court that the evidence of the other portion is attainable." "If the facts stated by [the witnesses] who are called, show *prima facie*, or even probable reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable: 25 Mich., 416, 417. These cases are really aimed at a suppression of evidence by management, and they do not decide, as is claimed, that all the witnesses to a transaction must necessarily be called by the prosecution; the justice of requiring this must depend upon circumstances, and it would seldom be as manifest in cases of mere misdemeanor as in cases of higher offenses, especially those accomplished by violence. But in this case there was no reason to suppose that the prosecution had failed to put all parts of the transaction before the jury by its evidence, and the testimony of other by-standers could only have been cumulative. Moreover, the connection of the Hemstocks and Bogart with the affair was such as fairly to excuse their being called. They must have known a great wrong was being perpetrated, and they were assisting, and one of them a principal in it. Had it been a crime of violence, their connection with it was such as would have justified the state in making them parties defendant, and though this statute does not provide for punishing them, we cannot say that the court erred in not requiring the prosecution to give credit to their testimony by calling them. They were present in court, and the defendant had the benefit of their testimony afterwards, and if the court had any discretion in the premises, as we think it had, the discretion was not abused.

IV. A further question arises upon the instructions to the jury. One of them was, "If you think, from the appearance of the girl, and from the testimony in the case, that the defendant, although he could not have known positively what her age was, but if he had good reason to believe from all these facts that she was under the age of sixteen, then their verdict must be guilty." And again, that if, in the exercise of a reasonable discretion, he had reason to believe she was not sixteen, then he must be deemed to have united them in marriage knowing there was a

legal impediment. These charges are objected to as, in effect, making negligence the equivalent of guilty knowledge.

No doubt, where guilty knowledge is an ingredient in the offense, the knowledge must be found; but actual, positive knowledge is not usually required. In many cases, to require this would be to nullify the penal laws. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods, knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys, perhaps, of a notorious thief, under circumstances of secrecy, and at a nominal price, and the jury rightfully hold that these circumstances apprise him that a felony must have been committed: *Andrews v. People*, 60 Ill., 354; *Schriedley v. State*, 23 Ohio St., 130. If, by the statute now under construction, actual personal knowledge is required, the statute may as well be repealed, for it can seldom be established, even in the grossest cases. How many justices are likely to know the exact age of all the girls in their township approaching the age of consent? or even of all those in their immediate neighborhood, except as they rely upon reputation or family report? Or, in how many can they testify, of their own knowledge, that a young man and a young woman living as inmates of the same family, and recognized as brother and sister, do in fact bear that relation to each other? or, that one who comes to be married has not a wife living from whom he is not divorced? Indeed, in the great majority of cases one must obtain his knowledge as to the existence of legal impediments from common report, from the statements of third parties, from any sources, in fact, upon which individuals would rely in investigating for their own protection into such facts, and he would justly be deemed inexcusable if he should persistently shut his eyes to such facts as were apparent to everybody else.

We think there is no doubt that in this case the jury would have been warranted in finding, on the facts which appear, that the defendant had knowledge of the impediment, had the instructions been such as the defendant insists they should be. One fact not hitherto stated would have been regarded as very significant, namely, that the defendant, although required by

stat
Com
girl,
ance
prop
have
age
testi
upon
to ta
B
have
same
the c
of o
cour
have
them
the c
pres
facts
with
obje
TH
TH

FALSE

In sec

"

an

an

An in

th

te

ay

p

statute to examine one of the parties on oath, neglected to do so: Comp. L., § 4726. This, in view of the extreme youth of the girl, was a very significant fact, and looks like a careful avoidance of the proper means of information. Had he taken the proper evidence under oath and been deceived, perhaps he would have been justified, even though he had had reason to believe the age of consent had not been reached; but where he neglects the testimony which he is required to take, and pretends to rely upon the less satisfactory oral statement, which he is not required to take, the neglect may well be imputed to illegal intent.

But the question whether, on the evidence, the jury ought to have found that the defendant had guilty knowledge is not the same as the question presented here. We are not agreed that the charge of the circuit judge can be supported, though some of our number are inclined to think it may be. The better course, unquestionably, would have been for the circuit judge to have submitted all the facts to the jury, and to have allowed them to draw their own conclusions regarding the knowledge of the defendant that he was proceeding unlawfully. It is to be presumed that the jury would have dealt intelligently with the facts, and not permitted a reckless official to have set at naught, with impunity, the provisions of a statute which has for its object the prevention of unfit, immoral and scandalous marriages.

The circuit court will be advised to grant a new trial.

The other justices concurred.

NORRIS v. STATE.

(25 Ohio St., 217.)

FALSE PRETENSES: *Person defined — Locality of offense — Indictment — What averments are sufficient.*

In section twelve of the crimes act, as amended February 21, 1878, declaring "that if any person, by any false pretense or pretenses, shall obtain from any other person," etc.; the word "person," in the latter phrase, includes artificial as well as natural persons.

An indictment for obtaining goods by false pretenses is sufficient, if it allege that the goods were obtained by the defendant by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon them, and was induced thereby to part with the goods.

Where A, by false pretenses contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county, and the offense must be prosecuted therein.

Error to the common pleas of Clark county.

The indictment is for obtaining goods by false pretenses, and was found at the January term of the court of common pleas of Clark county, Ohio, A. D. 1874. under a statute passed and which took effect February 21, 1873 (70 Ohio L., 39), which provides:

"That if any person, by any false pretense or pretenses, shall obtain from any other person any money, goods, chattels, etc., * * * with the intent to cheat and defraud the owner of said money or property, * * * he shall, on conviction thereof, if the value of said money or property so obtained * * * shall be equal to or exceed \$35, be imprisoned in the penitentiary not more than three years, nor less than one year," etc.

The substantive part of the indictment under which the prisoner was tried, convicted and sentenced, is as follows:

"That John T. Norris, late of the county of Clark aforesaid, on the 24th day of September, A. D. 1873, at the county of Clark aforesaid, did unlawfully, feloniously and falsely pretend to the Akron Sewer-pipe Company—the said Akron Sewer-pipe Company then and there being an incorporated company, and doing business as such incorporated company under and by virtue of the laws of Ohio—that he, the said John T. Norris, was then and there the owner of a farm, known as the Mohawk Small Fruit Farm, one and a half miles east of the city of Springfield, in said county of Clark, and on the Charleston pike, and did then and there unlawfully, feloniously and falsely pretend that he, the said John T. Norris, was then and there a person of good financial responsibility by referring the said Akron Sewer-pipe Company to any business firm of the city of Springfield, and did unlawfully, feloniously and falsely pretend that any of the business firms of the said city of Springfield would indorse and recommend the said John T. Norris to the said Akron Sewer-pipe Company as a person then and there worthy of credit and trust by said Akron Sewer-pipe Company, by which said false pretenses the said John T. Norris then and there unlawfully and feloniously did obtain from the said Akron Sewer-pipe Company certain sewer-pipe of the value of \$41.90, of the property, goods and

chattels of the said Akron Sewer-pipe Company, with the intent then and thereby, by the said false pretenses aforesaid, to induce the said Akron Sewer-pipe Company to deliver to him, the said John T. Norris, the sewer-pipe aforesaid, without making any inquiry as to the financial responsibility of him, the said John T. Norris, and with intent then and there, by the false pretenses aforesaid, to cheat and defraud the said Akron Sewer-pipe Company of the said sewer-pipe aforesaid, whereas, in truth and in fact, the said John T. Norris was not then and there the owner of the said farm known as the Mohawk Small Fruit Farm, one and a half miles east of the city of Springfield in the county of Clark; and whereas, in truth and in fact, the business firms of the city of Springfield would not then and there indorse and recommend the said John T. Norris then and there to be a person of good financial responsibility; and whereas, in truth and in fact, the business firms of the city of Springfield would not then and there recommend him, the said John T. Norris, to the said Akron Sewer-pipe Company to be a person then and there worthy of trust and credit by said Akron Sewer-pipe Company, and the said John T. Norris was not then and there a person of good financial responsibility, and the said John T. Norris, at the time he so falsely pretended as aforesaid, well knew said false pretenses to be false, contrary, etc."

Keifer & White and John H. Littler, for the plaintiff in error:

I. When the word "person" is used in the statute, especially a criminal statute, a natural person is intended, unless something appears in the act to show that it applies to artificial persons: *Blair v. Worley*, 1 Scam., 178; *Betts v. Menard*, 1 Breese, 395. Section 227 of the Criminal Code, and the acts defining certain crimes (S. and C., 409, section 22; 412, 421, 422, 426; 408, sec. 18; 439, sec. 15; and S. and S., 265, 269, 273), clearly show that the general assembly has not, except by special provision, construed the word person, in criminal acts, to include corporations. We claim for the plaintiff a strict construction of the statute under which he is indicted.

The indictment is defective in this: it does not set forth that the owner of the property relied upon the false representations, and was induced by means thereof to part with his property: *State v. Philbrick*, 31 Maine, 401; *Com. v. Strain*, 10 Met., 521; *People v. Skiff*, 2 Park Cr., 140; *People v. Herriek*, 13 Wend., 87; *People v. Stetson*, 4 Barb., 151; *Enders v. People*, 20 Mich.,

233; *State v. Evers*, 49 Mo., 542; *State v. Green*, 7 Wis., 676; *Rex v. Goodall*, Brit. Cro. Cas. (R. and R.), 561.

The indictment should aver all the material facts which it is necessary to prove to produce a conviction, and with such reasonable certainty as to advise the accused what he may expect to meet on the trial: *Dillingham v. The State*, 5 Ohio St., 280; *Lamberton v. State*, 11 Ohio, 282; *Farris v. State*, 3 Ohio St., 171; *Robbins v. State*, 8 Ohio St., 114.

II. The court erred in charging the jury as to the venue. Bodily presence in a county is not essential in determining the place of trial: *People v. Adams*, 3 Denio, 190; *Adams v. People*, 1 Com., 173.

Norris was to pay the freight; the goods were shipped at his risk, and he had specially pointed out the carrier.

Delivery of goods to a carrier in the usual course of business is equivalent to a delivery to a purchaser.

The carrier is always considered the agent of the buyer: Story on Sales (Perkins, 3d ed.), sec. 306, and notes 2, 3 and 4 to said section; *Hooben v. Bidwell*, 16 Ohio, 510; *Com. v. Taylor*, 105 Mass., 172; Redfield on Carriers, section 302; *People v. Haynes*, 14 Wend., 546; *Magruder & Bro. v. Gage*, 3 Am. Rep., 177; Story on Sales, section 306, note 4; Brown on Carriers, 477; *Hooper v. Chicago & N. W. R. R. Co.*, 9 Am. Rep., 439; *Dunlap v. Lambert*, 6 Cl. and Fin., 600.

As to when title to goods passes by delivery to a carrier, see 5 Ohio, 89; Story on Sales, sections 321, 342; *Newhall v. Varges*, 15 Me., 314; *Kendler v. Ellison*, 47 N. Y., 36; 2 Kent Com., 433; *Mills v. Ball*, 2 B. and P., 461; *Openheim v. Russell*, 3 B. and P., 54; *People v. Haynes*, 14 Wend., 5, 46, and cases there cited; *Com. v. Taylor*, 105 Mass., 172.

The crime is only complete when and where the goods are obtained: Bish. Cr. Pr., sections 60, 70, 73; 1 Bish. Cr. Law, sections 79-83, 107; 2 Whar. Cr. Law, sections 2141, 2142; *Adams v. People*, 3 Denio, 190; Same, 1 Comst., 173; *Com. v. Taylor*, 105 Mass., 192; *People v. Haynes*, 14 Wend., 546; *Griffin v. State*, 26 Ga., 493; *People v. Rathbun*, 21 Wend., 509; *Com. v. Blanding*, 3 Pick., 304; *People v. Griffin*, 2 Barb., 427; *People v. Sully*, 5 Park., 142; Whar. Cr. Law, section 154; *Com. v. Gillespie*, 7 S. and R., 469; *Reg. v. Leech*, Dears., 642; *Rex v. Brisas & Scott*, 4 East., 163, 171; *Scurry v. Freeman*, 2 B. and P., 381, 382; *Rex v. Garrett*, 22 Eng. L. and Eq., 607;

Rea v. Johnson, 6 East., 583; *Regina v. Jones*, 1 Den. C. C., 551; *Regina v. Jones*, 1 Eng. L. and Eq., 533.

There is no analogy between the larceny of goods and the obtaining of goods by false pretenses in one county and carried by the offender to another, as to where the offender might be apprehended and tried. In the latter case it must be in the county where the goods were obtained: *Regina v. Stanberry*, 9 Cox C. C., 94; Fisher's Digest, 169.

III. The court erred in its charge to the jury on the question of the value of the goods.

If the court erred in charging upon the question of venue, then the charge was right on the question of value. But if the court was right in its charge on the former question, then it follows that it erred in its charge on the latter.

If the goods were not *obtained* by the accused until they reached him in Clark county, then their value must be ascertained in their condition where so obtained.

The price agreed to be paid for the goods is immaterial, as it is their real market value at the time they are obtained, which the jury must find and act upon in fixing the punishment under the law.

John Little, attorney-general, for the state:

1. "Person" is a technical word, and comprehends in its definition artificial as well as natural persons.

And where a word of a fixed meaning is used in a statute, the legal presumption is that the legislature intended to use it in its legal sense: *Turney v. Yeoman*, 14 Ohio, 207; *Anderson v. Milliken et al.*, 9 Ohio St., 568. Courts will look to the object of a statute: *Burgett v. Burgett*, 1 Ohio, 469; Ohio Digest, 570, and authorities cited.

The question raised here has been decided in *Allon v. The State*, 10 Ohio St., 287.

2. The act 30 Geo. II., c. 24, is identical with ours in not fixing the venue, etc. Under it was held that the prosecution should be had at the place where the goods were obtained, to wit, received, and not where the false pretenses were made: 1 Chitty Crim. Law, 191; 2 *Ib.*, 998; 4 Barn. and Ad., 179. See Roscoe's Cr. Ev., 6 ed., 453; *People v. Sully*, 5 Parker, 142, 170; 2 Whar., secs. 2142, 2081; 21 Wend., 507; 9 Gray, 97; 3 Greenl. Ev., sec 153; 11 Ohio, 438.

A portion of these authorities are in point on the hypothesis that this offense is akin to larceny.

The relation of agent for vendor or vendee of a carrier, is one created by law, and only exists when there is a sale or other legitimate transaction between the contracting parties. But, in this instance, there was no sale. There was neither vendor nor vendee. The crime of the defendant vitiated the whole transaction. The title of the property never passed to Norris, but remained in the company even after actual delivery to Norris at Springfield. When he took—"obtained"—the goods at Springfield, he took them *animus furandi*, from the company.

The law creates, as has been said, the relation of agent between the carrier and vendor or vendee, etc. It would not, it is submitted, interpose to create that or any other relation between a carrier and a criminal, to enable the latter to carry off his plunder.

There is no necessary logical connection, as it seems to me, between the question of *venue* and that of the place where the goods must be valued. There is none such in larceny, and why should there be here? If the position assumed by counsel for plaintiff in error be correct, then all a criminal would have to do to escape the penalty of the law in such case, would be to ship the goods to different counties in quantities of less than \$35 worth to each. In other words, the question of the defendant's guilt would depend upon his disposition of the goods—upon whether he scattered or kept them together.

GILMORE, J. There are a number of errors assigned in the record, upon which the plaintiff in error asks for a reversal of the proceedings and sentence against him in the court below.

It will be necessary to notice only the first three assigned, which are substantially:

1. That the facts stated in the indictment do not constitute an offense.
2. That the court erred in its charge to the jury on the question of venue.
3. That the court erred in its charge to the jury on the question of the value of the goods.

Two objections are urged to the indictment: *First*. That the owner of the goods alleged to have been fraudulently obtained is an incorporated company, and therefore not a "person," within the meaning of the statute.

In support of this proposition two cases are cited: One—

Blair v. Worley, 1 Scam., 178—decides that a statute giving the right to remove fences made by mistake upon the lands of *other persons*, applies only to natural persons, and not to the United States, or the state of Illinois. The other—*Betts v. Menard*, 1 Breese, 395—decides that the ferry law does not authorize a county court to grant a license to ferry to a corporation, giving as one, among other reasons, that the law requires that the party receiving the grant shall give bond, etc., “conditioned that *he, she, or they* will keep the ferry according to law.” The terms used in the statutes referred to in these cases respectively, exclude the idea that corporations were intended to be included.

But it is insisted that the rule of strict construction in this respect must be applied in this case, and that the crime “can only be committed by a ‘*person*’ against the property of another ‘*person*,’ who must be, in either case, a natural person.”

It is well settled that the rule of strict construction is not violated by giving the words of a statute a reasonable meaning according to the sense in which they were intended, and that captious objections must be disregarded. Guided by this rule, let us ascertain in what sense the legislature used the words *any other person*, in the statute under which the defendant is indicted; and in this we will be aided by observing another rule of construction in connection with it, which is, that where a clause, susceptible of two meanings, is used in a statute which has received a judicial construction, and the same clause is used in a subsequent statute, upon the same or an analogous subject, it is to be understood in the latter in the same sense as in the former, unless the object to which it is applied, or the connection in which it stands, requires it to be differently understood in the two statutes.

This statute, and those punishing larceny, are not only analogous in the nature of the offenses made punishable and the degree of punishment, but with the word “*person*” understood, as it must be, *property of another*, as used in the larceny acts, they are identical in respect to the persons against whom these offenses may be committed; and our courts have always held that it is larceny to steal the goods or moneys of a corporation.

Again, the twelfth section of the crimes act provides against burning, or causing to be burned, the dwelling-house, store-house, warehouse, etc., *the property of any other person*, etc.

This is the same phrase used in the "false pretense statute;" and this court sustained an indictment against A, for procuring H to burn a warehouse, the property of an incorporated railroad company: *Allen v. The State*, 10 Ohio St., 287.

Again, the criminal code of Ohio, section 227, provides that the word "person" includes a corporation as well as a natural person. This only prescribes the rule in criminal practice on this subject; but, under the rules of construction, it may properly be regarded as an indication of legislative intent on this point, in the passage of criminal laws since the adoption of the code.

Taking all these in connection with the fact that the statute making it criminal to obtain goods by false pretenses, has been passed since the adoption of the code, and since the larceny and arson statutes have received the judicial constructions above indicated on the point under consideration, and applying the rules of construction above stated, we hold that the word "person," as used in the statute, includes artificial as well as natural persons.

The second objection is, that it is not averred in the indictment that the owner *relied* upon the false pretenses and representations, and was induced by means thereof to part with his property. We have been referred to quite a number of authorities supposed to support this objection, which, on examination, are found not to do so.

Two questions are discussed in them. First, as to whether the offenses charged were within the statute, of which no notice need be taken; and, second, whether the indictment in the case then under consideration was good. And in not a single case examined is it found that an indictment otherwise good was held bad for want of the averment in question. For example, we take the case of the *State v. Philbrick*, 31 Me., 401, which is claimed by counsel to be directly in point.

The alleged false representations in this case were made by Philbrick to Goff, the prosecuting witness, in reference to the age and value of a mare he was attempting to exchange for a horse owned by Goff.

The court, in deciding the case, said: "The former part of this indictment alleges that the accused, by false pretenses, intended to cheat and defraud Goff, and proposed to exchange his mare for the horse of Goff; but there is no averment that

such an exchange was made, or that the false pretenses were made with a view or design to effect such an exchange."

It is true that the court, in holding the indictment bad, did remark, in substance, that it was not averred that the prosecuting witness relied upon the representations of the defendant; but it is apparent that the indictment, in other respects, was so defective that the additional allegation would not have cured it. Similar remarks were made by the court in disposing of the case of the *Commonwealth v. Strain*, 10 Met., 521, which is also cited. This was a case in which it was alleged that the defendant had made certain false representations concerning a watch to the prosecuting witness, Blake, whereby he obtained thirty-five dollars from the latter. The court said: "The case at bar, if confined in its proof on the trial by the jury to the mere allegations of the indictment, would be certainly quite bald. The indictment does not allege any bargain, nor any colloquium as to a bargain for a watch, nor any proposition of Blake to buy, or the defendant to sell a watch, nor any delivery of the watch, as to which the false pretenses were made, into the possession of Blake as a consideration for the money he paid the defendant." The averment contended for would not have cured this indictment. These illustrate the nature of the questions in most of the cases referred to on this point.

Our statute is substantially a transcript of the act of 30 Geo. II., c. 24, and the indictment in this case follows the English precedents under it, omitting none of the material averments under it. It sets out with particularity the facts and representations made by the defendant, and alleged to be false; that they were made with the intent to induce the owner to deliver the goods to him; that his intent was fraudulent, and his purpose was to cheat the owner, and that *by means of these false pretenses he did obtain the goods*, etc. The truth of these pretenses is denied. It will be seen that the defendant was fully advised of the nature and extent of the charges against him. The facts stated in the indictment are such that, if admitted to be true, it would be clear that the owner did rely upon them in parting with his goods. This indictment is good, therefore, in this respect.

2. The court erred in its charge on the question of venue.

The bill of exceptions shows that the defendant resided in Springfield, Clark county, and the sewer-pipe company was

located and doing business at Akron, Summit county, Ohio. The goods were obtained by a letter containing the alleged false representations, accompanied by an order in this language: "You may ship me via frt. line," etc. The Cleveland, Mt. Vernon & Columbus railroad was doing a freight business between Springfield and Akron. The day after the letter and orders were received at Akron by the company, it delivered the goods ordered as above, at the freight depot at Akron of the railroad above named, billed, consigned and to be shipped by the railroad company to the defendant at Springfield, Ohio, at his risk and cost for freight. Upon this state of facts the court charged the jury as follows: "If said letter so written and sent by the defendant to the said Akron sewer-pipe company was prepared and written by him at Springfield, in Clark county, Ohio, and by him mailed at Springfield to said company at Akron, Summit county, Ohio, and was by said company received at Akron, in Summit county, Ohio, where said company had their goods and did business, and said company, in pursuance of the terms of said letter, shipped said goods at Akron, in Summit county, by railroad freight line, to the defendant at Springfield, Ohio, and that said railroad line at Akron received said goods from said company, consigned to defendant at Springfield, and brought said goods on railroad to Springfield and there delivered them to the defendant, and the defendant first obtained actual possession at Springfield by the delivery of the goods by the railroad company to him there, and if the jury should also find against the defendant upon the matter of said false pretenses as alleged in the indictment, then the jury may legally find that the said offense charged was committed in Clark county, Ohio." Exceptions were raised to this part of the charge, and are assigned for error.

On the facts as above stated, the weight of authority is clearly that the railroad company was the agent of the defendant for receiving the goods for him at Akron, and carrying them to him at Springfield, and the delivery of the goods to it, by the sewer-pipe company, was, in legal contemplation, a delivery of the goods to the defendant at Akron. The title passed to the defendant, subject only to the sewer-pipe company's right of stoppage *in transitu*. The defendant obtained actual possession of the goods at Springfield, from his agent, whose possession was his own, and not from the sewer-pipe company. Only one delivery

could be made, and that had been previously completed at Akron. The legal fiction in larceny (where the owner does not part with the title to his property), that there is a new taking and carrying away into every county into which the thief may carry stolen goods, does not apply in this case, where the owner did voluntarily part with the title to the goods in question. The offense was, therefore, committed and completed in Summit county, and could only have been legally prosecuted there.

There was error in the charge of the court in this respect, for which the judgment must be reversed.

3. As to the value of the goods. The court properly instructed the jury to find the market value of the goods at Akron when they were placed on the cars, consigned to the defendant at Springfield. If this court had found, however, that there was no obtaining of the goods by the defendant till they reached Springfield, then the title would not have passed till such delivery, and the value of the goods, at the time and place that the delivery was made, is where and when the value should have been ascertained. This court having found that the offense was committed in Summit county, the charge was correct in reference to the finding of the value of the goods.

Judgment reversed, and cause remanded to Clark common pleas.

MCLIVAIN, C. J., and WELCH, WHITE and REX, J. J., concurred.

NOTE.—In *Stewart v. Jessup*, 51 Ind., 413, it appeared that the accused made false representations, as to his responsibility, to the prosecutor in Indiana. On the faith of these representations the prosecutor took a car-load of horses to New York, with the view of selling them to the accused when he got there. In New York he did sell the horses to the accused, on the faith of the false representations made in Indiana. It was *held*, on the crime, if any, was committed in New York, and could not be prosecuted in Indiana.

In *Com. v. Taylor*, 104 Mass., the evidence was that the accused made false representations to a dealer in mowing machines in Worcester, Mass., and thereby induced the dealer to ship two machines to certain persons in Vermont, whose names he gave. There were in fact no such persons in Vermont, and the prisoner himself went there and got the machines. It was *held*, on these facts, that he obtained the machines in Worcester county, and that the case was properly triable there.

In *People v. Adams*, 3 Den. (N. Y.), 190, 1 N. Y. (1 Comst.), 173, 610, it appeared that defendant, being in Ohio, by means of false receipts which he caused to be presented to the prosecutors in New York by innocent agents,

obtained money which the prosecutors paid to the defendant's innocent instruments in New York. It was *held* that the defendant was properly indicted and tried in New York, although he himself had never been in New York.

For other decisions to the effect that the offense is triable where the property or money is obtained, without regard to the place where the false pretenses are made, see *People v. Sully*, 5 Park. Cr. (N. Y.), 142; *Skiff v. People*, 3 Park. Cr. (N. Y.), 189.

KELLOGG v. STATE.

(26 Ohio St., 15.)

LARCENY: *False pretenses; distinction between them — Confidence game.*

When a contract for the loan of money is induced by fraud and false pretenses of the borrower, and the lender, in performance of the contract, delivers certain bank-bills, without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false pretenses, but is not guilty of the crime of larceny.

Error to the court of common pleas of Hamilton county.

At the June term, 1875, of the court below, the plaintiff in error was convicted of the crime of larceny, and sentenced to the penitentiary for a term of years.

The testimony offered on the trial showed that, in the month of April preceding, the prisoner had obtained \$280 in bank-bills, from the prosecuting witness, under the following circumstances:

The witness and the prisoner had first met and formed a casual acquaintance as passengers on a train of cars passing from St. Louis to Cincinnati. After their arrival at Cincinnati they again met at the railroad depot, where the prosecuting witness was about to take another train for his home in Madison county, when the following occurrences took place, as detailed by the witness: The defendant asked me if I was going to take that train; I said yes. He said he thought he would go on that train too. Then a man came up to us and said to the defendant, "if you want to go on that train, you had better get your baggage and pay your freight bill." The defendant then said, "Confound these fellows, they won't pay me any premium on my gold, and I have no other money to pay this freight bill, and I don't want to give them two hundred and eighty dollars in gold and get no premium." He then said to me, "Will you let me have \$280 in currency, and I will give you this gold to hold as security until I can go to the bank and draw some money which I have there,

and I will then pay you \$280 back." He further said, "I must get my freight out to-night, and they won't let me have it until I pay the bill, which is \$280." I then told him I would let him have the two hundred and eighty dollars to pay his freight bill; which I did, and he gave me fourteen pieces of what he said was gold, and which I took for twenty-dollar gold pieces, and I gave him \$280 in paper money. He started off, and I examined them and found that they were not twenty-dollar gold pieces, nor were they gold at all. * * I followed him, but did not overtake him or see him any more until he was arrested.

On cross-examination, the prosecuting witness testified as follows: "I delivered my money to him voluntarily. He used no force or violence to obtain it from me. I never expected to get the same money again. He said he would go to the bank and draw some money, and come back and pay me what he borrowed and get the gold."

The commission of the crime charged in the indictment was not otherwise proved than as above stated.

The court was requested by the defendant to charge that, "if the jury found, from the evidence in the case, that the defendant fraudulently and wrongfully induced Denton, the prosecuting witness, to part with the money mentioned in the indictment; and if they also found that the prosecuting witness was fraudulently induced to, and in fact did part with the possession and property in the money described in the indictment," the defendant could not be convicted of the offense of larceny as charged in the indictment. The record shows that "the instruction in that form the court refused to give," but did give the same with the following explanation: "That the word property, as used, does not mean the mere money—it means the proprietary right of ownership in the money. So that, while the manual possession of the money may be in one person, the legal technical property may still be in another, and a bailment or possession of goods and chattels obtained by a trick or fraud does not transfer the property to the person practicing the trick or fraud. If you find, therefore, that the mere possession of the money with the owner's consent was fraudulently obtained by the defendant with intent to steal it from the owner, it is larceny."

O. H. Blackburn, for plaintiff in error:

The testimony shows that Kellogg obtained the money from Denton without force or violence; that Denton delivered the

money to him voluntarily, and did not expect to get the same money again. This being so, there was no trespass, and could be no larceny: 2 Bish. Cr. L., sections 812, 813, 818, and authorities cited; 2 Wharton Cr. L., sections 1853, 1854; *Ennis v. The State*, 3 Iowa, 87; *Welch v. People*, 17 Ill., 399; *Wilson v. The State*, 1 Porter, 118; 15 Serg. and R., 93. Nor does it change the rule when the consent is obtained by fraud: 2 Bish., Cr. L., section 811; *Rex v. Summers*, 3 Salk., 194; 2 E. P. C., 668; 15 Serg. and R., 93; *Cary v. Hotailing*, 1 Hill (N. Y.), 311.

McILVAINE, C. J. On the trial below, the jury was properly instructed that the defendant could not be convicted of larceny, if he obtained the possession of the money alleged to have been stolen from the prosecuting witness with his consent, if it was further found that, at the time of the transfer of the possession, the right of property in the money also passed from the prosecuting witness to the defendant, although the witness was induced, through the fraud of defendant, to part with the possession and the property in the money. And there was no error in the further instruction: "If you find, therefore, that the mere possession of the money, with the owner's consent, was fraudulently obtained by the defendant, with intent to steal it from the owner, it is larceny."

This last instruction, however, was the predicate of a proposition which had been given in explanation of the first instruction, to wit: "While the manual possession of money may be in one person, the legal technical property may still be in another; and a bailment, or possession of goods and chattels, obtained by a trick or fraud, does not transfer the property to the person practicing the trick or fraud." Whether this, as an abstract proposition of law, be true or false, it was certainly misleading in the case as it was made in the evidence. The jury could not well have understood it otherwise than as a declaration by the court that the transaction, as detailed by the prosecuting witness, amounted to a mere contract of bailment, which left the right of property remaining in the prosecuting witness.

Now, if the common law at all recognizes a class of bailments, corresponding to the *mutuum* of the civil law—to wit, where a loan is made of money, wine, or other thing that may be valued by number, weight or measure, which is to be restored only in kind of equal value or quantity—it is not true that the right of

property in such bailments remains in the bailor; but on the other hand, the absolute property passes with the possession, and rests with the borrower. In such cases the fraud of the borrower no more prevents the passing of the title to the thing loaned upon delivery, than does fraud on the part of a purchaser of goods. The contract in either case is not void, but only voidable at the election of the lender or seller. The better opinion, however, seems to be that such a loan is not a regular bailment at common law, but falls more properly under the innominate contract, *do ut facies*, and results in a debt, and not in a trust.

The testimony before the jury in the court below tended to prove a loan of money from the prosecuting witness to the defendant, whereby the borrower became indebted to the lender, and assumed to make payment in other money. The testimony of the witness was, that he voluntarily delivered the money to the defendant, and never expected to get the same money again. It is true he was induced to make the loan through the fraud and false pretenses of the defendant. No doubt a crime was thus committed by the defendant, but it was the crime of obtaining money under false pretenses, and not a larceny. To constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential: 1, the owner, at the time of parting with the possession, must expect and intend that the thing delivered will be returned to him or disposed of under his direction for his benefit; 2, that the person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession only, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute a larceny.

In such case the title rests in the fraudulent taker, and he cannot be convicted of the crime of larceny, for the simple reason that, at the time of the transaction, he did not take and carry away the goods of another person, but the goods of himself.

Had the law been thus stated to the jury, there is no doubt the verdict would have been not guilty, as he stood charged in the indictment.

Judgment reversed, and cause remanded for such further proceeding as may be lawfully had in the premises.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

STATE v. ANDERSON.

(47 Iowa, 142.)

FALSE PRETENSES: Crime not committed where title does not pass.

Where, by the agreement between the prosecutor and the defendant, the defendant gets no title to the property which is delivered to him on the faith of the alleged false pretenses, the crime of obtaining property by false pretenses is not committed.

SERVERS, J. The indictment charged "that * * defendant did obtain from the St. Paul harvester works, through J. O. Yetzer, * * * one Elward harvester, of the value of one hundred and ninety dollars." The defendant pleaded not guilty. The false pretenses used for the purpose of obtaining said property were in writing, and were as follows:

" \$115.00.

ATLANTIC, IOWA, July 12, 1875.

"For value received, on or before the first day of October, 1876, I, the subscriber, of Benton township, county of Cass, and state of Iowa, promise to pay to the order of the St. Paul harvester works, one hundred and fifteen dollars, at the Cass County Bank, in Atlantic, with interest at ten per cent per annum, from date until paid, and, in addition, I will pay five per cent attorney's fees, if suit is commenced on this note.

"The express condition of the sale and purchase of the Elward harvester, for which this note is given, is such that the title, ownership, or possession, does not pass from said St. Paul harvester works until this note is paid in full; that said St. Paul harvester works shall have full power to declare this note due, and take possession of said machine at any time they may deem themselves insecure, even before the maturity of this note. For the purpose of obtaining credit, I, P. H. Anderson, hereby certify that I own, in my own name, forty acres of land in section thirty-one, township of Benton, county of Cass, and state of Iowa, with twenty-five acres improved, worth \$1,000, which is not incumbered by mortgage or otherwise, except ——. I own \$800 dollars worth of personal property over and above all indebtedness.

"P. H. ANDERSON.

"P. O. Atlantic, county of Cass, state of Iowa."

The "state introduced evidence which tended to show the representations made and their falsity, and also that defendant purchased of the St. Paul harvester works a harvester, which the agent of the company was induced to sell and deliver by and through said representations."

After the state rested, the defendant moved the court to "direct the jury to acquit the defendant, for the reason that it appeared by the contract the defendant did not obtain, by the alleged false representations, the title to or property in said harvester, but the same remained in the St. Paul harvester works company, and that said company, notwithstanding the delivery of the harvester to defendant, continued to be the owner of the same, with the right to resume possession thereof at any time," which motion was sustained, and the jury so directed. The correctness of this ruling is the only question to be determined.

The statute provides: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property * *:" Code, § 4073.

In 3 Archbold's Criminal Practice and Pleading, 467, it is said: "In order to convict a man of obtaining money or goods by false pretenses, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right to the property in the thing obtained, and not merely with the possession of it." This doctrine is recognized in 3 Greenleaf, § 160, and also, as we understand, in 2 Wharton on Criminal Law, § 2149.

The only cases cited by the attorney-general as being in conflict with these authorities, are *Skiff v. The People*, 2 Parker's Criminal Reports, 139, and *People v. Haynes*, 11 Wend., 558. The former has but little, if any, bearing on the question before us, and the latter was reversed in *The People v. Haynes*, 14 Wend., 547, and it was then *held*, where a person sold goods to another on credit and delivered the same on a steamboat designated by the purchaser, to be forwarded to his residence, that the sale became complete, and the title and possession vested in the purchaser. After such delivery the seller made the attempt to stop the goods while in transit, to prevent which the purchaser made certain false representations, in consequence of which the seller did not persist in his attempt to seize the goods. The purchaser was indicted for obtaining the goods by means of false

pretenses, and it was *held* he could not be convicted. It is evident, in the case at bar, that the seller did not intend to part with either the right of property or possession, for it is expressly provided in the contract of purchase and sale "that the title, ownership or possession does not pass" until the note is paid, and the right "to declare the note due and take possession of the machine at any time," was expressly reserved.

The defendant did not even obtain an unqualified right to the possession. The plaintiff, in a legal sense, parted with nothing. It is unnecessary to go as far as the rule laid down in Archbold, in order to sustain the ruling below. At least, we think the defendant must have obtained, by means of the false pretenses, either the title or the unqualified right of possession as between himself and his vendor, for at least some length of time. Here the delivery and resumption of the possession by the vendor could be at the same instant of time, or as near thereto as it was possible for the mind to act and determine.

Affirmed.

NOTE.—The distinction between the crimes of obtaining property by false pretenses and of larceny, by a trick, is this: The crime of larceny is committed where the prisoner, by means of fraud, falsehood, a trick, or any fraudulent device, obtains possession of the property of another, with the intent, at the time he gets it into his possession, of stealing it, the owner not intending to part with the title to the property. False pretenses is committed where, by means of false pretenses or representations, the owner is induced to part with the title to his property. See *Oline v. State*, 43 Tex., 494; *Vickery v. State*, 19 Tex., 326.

PEOPLE v. JACOBS.

(35 Mich., 86.)

FALSE PRETENSES: *Information—Matter of opinion not a false pretense—Erroneous charge.*

In an information for false pretenses it is not necessary to allege in express words that the party defrauded relied upon the false representations made, but this is a necessary implication from the allegation that he was induced by the false representations to part with his money.

If any of the false representations charged in the information are matters of opinion, and immaterial, a charge that if the prosecutor parted with his money relying upon any of the false representations alleged, the offense

is complete, without discriminating between those that are material and those that are immaterial, is erroneous.

Statements as to the value of lots, or that they are "nicely located," are matters of opinion, and not facts, and therefore not within the statute.

GRAVES, J.: Jacobs was convicted on a charge of having obtained money of one Barts by false pretenses, and the case comes here on exceptions before judgment.

Many exceptions seem to have been taken, but much the larger portion are properly abandoned. There are some others it would be desirable to consider if the record was in better shape. Jacobs called on Barts to borrow five hundred dollars, and proposed to secure him by mortgage on land owned by his wife, Mrs. Jacobs. After some talk, the loan was made, but Barts retained ten dollars, by understanding, to pay his expenses in going subsequently to view the land. Mrs. Jacobs gave her mortgage, together with her note, to Barts for the money. In this negotiation, as charged in the information, Jacobs made the false representations concerning the land mortgaged. It alleges that he falsely and feloniously pretended to Barts that Mrs. Jacobs was owner of lots thirty-six, thirty-eight, forty and forty-two, in block three, in Harriet M. Clement's subdivision of the south one-third of fifteen acres lying in a square form in the northwest corner of the northeast quarter of section twelve, in town six south, of range twelve west, according to the recorded plat; that the lots were situated within the city limits of the city of Grand Rapids; were on the street running directly from the business part of the city to the fair grounds, near the city limits; were between such fair grounds and the business portion of the city; that the lots were nicely located; were quarter-acre lots and constituting one square acre; that they would sell at any time at from twelve hundred dollars to fifteen hundred dollars cash; were worth much more than that, and were entirely free from all incumbrance. These pretenses are afterwards alleged to have been severally false. On the opening of the trial it was objected that the information set up no offense. The ground of the objection was not explained. But at a later stage of the trial, the reason for the objection was stated to be, that the information did not state in words that Barts relied on the representations. The objection is not much insisted on, and is not tenable.

The allegations in this particular are formally sufficient. It was not essential to charge in express terms that Barts gave

credit to the false pretenses. That he did so was a necessary implication from the allegation that he was induced by the representations to part with his money: *State v. Penley*, 27 Conn., 587.

The court charged that if the jury believed, from the evidence, that any of the pretenses charged were proved to be false and fraudulent, and were part of the moving cause which induced Barts to part with his money, and that he would not have parted with it had not such false pretenses been made, they would be justified in finding him guilty.

The instruction must have been understood as assuming that each distinct pretense set up was a valid ground of charge, and on which a conviction might rest if found false and fraudulent and operative in any degree on Barts to cause him to make the loan.

No instruction was given that any representation laid as a false pretense could not legally be so laid, nor any instruction that any representation laid as a pretense was unproved, or any instruction to preclude the jury from resorting to the whole evidence and finding from it that all the representations laid as pretenses were in fact made. Hence, if any representation laid as a false pretense could not be lawfully impressed with that character, the jury were, in effect, permitted to convict upon it.

Now, the alleged pretense that the lots were "nicely located," was a distinct pretense in the information. But it was not such a representation as could be made the subject of criminal prosecution as a false pretense. It could not convey or be understood as conveying any definite idea at all. There is no standard for trying the accuracy of such a statement. What is a nice location to one may be far otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. No one can be supposed to accept such a representation as an assertion of the existence of some fact or circumstance sufficient to cause him to change his situation in reliance on it, and the law cannot measure or weigh people's fancies.

The alleged representation concerning the value of the lots to be mortgaged cannot be construed as anything beyond a matter of opinion, and it is not to be supposed the expression was understood in a sense more absolute. There is no reason for implying that Barts relied upon it, or was in any way or to any extent duped by it: *Bishop v. Small*, 63 Me., 12; *Mooney v.*

Miller,
cases cit
grounds
them as
would re
hardly p
The c
deemed
the proc
The o

FALSE P

A false st
they
the st
hand,
prude

JUDGE

This

obtained
false pr
was the
of Emi
from li

By th
from O
the hou
was a r
euted b

The
of Mrs
have n
defranc
incumb
we agr
was in

Miller, 102 Mass., 217; *Long v. Woodman*, 58 Mc., 49, and cases cited. These allegations were accordingly not sufficient as grounds of charge, and it was error to allow the jury to regard them as though they were. There are several topics which would require discussion and explanation before a jury, but are hardly proper for consideration here.

The conviction must be set aside, and in case another trial is deemed expedient, no doubt the prosecution will see to it that the proceeding is quite differently shaped.

The other justices concurred.

COMMONWEALTH v. GRADY.

(18 Bush (Ky.), 285.)

FALSE PRETENSES: *Crime not committed where the defrauded party has means of detecting the fraud at hand.*

A false statement that a house and lot were unincumbered, when, in fact, they were subject to a recorded mortgage, is not a false pretense within the statute, because the party defrauded had the means of detecting it at hand, and might have protected himself by the exercise of common prudence.

JUDGE ELLIOTT delivered the opinion of the court.

This is an indictment charging the appellee with having obtained the money and property of Presley O'Bannon by the false pretenses of fraudulently representing to O'Bannon that he was the owner of a house and lot in Owen's addition to the town of Eminence, and that the house and lot so owned were free from lien or mortgage to any one.

By these misrepresentations it is charged that appellee obtained from O'Bannon \$125 in money and some promissory notes for the house and lot; and that it turned out, on investigation, there was a recorded mortgage on the property, which had been executed by appellee to Lotty Kelso.

The indictment fails to state the amount of the mortgage lien of Mrs. Kelso, for if it was merely nominal the appellee may have made the representations charged with no intention of defrauding O'Bannon, but with the intention of removing the incumbrance with a part of the money received from him. But we agree with the opinion of the lower court, that the indictment was insufficient for several reasons.

In the case of the *Commonwealth v. Haughey* (3 Met., 223), it was charged that Haughey obtained credit on a note he owed R. R. Jones, upon the false and fraudulent pretense and representation that a large quantity of tobacco which Jones then purchased would average in quality with a sample which Haughey then and there exhibited to said Jones.

This court affirmed the judgment of the lower court dismissing the indictment, and say that a common caution on the part of Jones would have protected him from any injury; he could, without trouble, have retained his note till the tobacco was delivered; and if, upon an offer to deliver it to Haughey, it was not equal in quality to the sample exhibited, he could have rejected it.

So in this case, O'Bannon could have refused to execute and deliver his note to appellee, or even to pay him the \$125 in money, till he stepped to the clerk's office and ascertained from the records of the Henry county court whether the title to the house and lot was such as represented.

In Wharton's Criminal Law, vol. 2, section 2129, the doctrine is laid down that "a representation, though false, is not within the statute (meaning the statute against obtaining money and property by false pretenses), unless calculated to deceive persons of ordinary prudence and discretion;" and this author further says that the statutes against obtaining money, etc., by false pretenses, ought not to be so interpreted as to include a case where the party defrauded had the means of detection at hand.

Here O'Bannon had the means of detection at hand; for, by a visit to the clerk's office, he could soon have ascertained whether the appellee had the unincumbered title to the house and lot as represented by him.

Wherefore the judgment is affirmed.

NOTE.—And so, in *State v. Young*, 76 N. C., 258, inducing a person to buy cotton on the false pretense that it was of the grade "good middling," was held not within the statute, because the purchaser might have examined the cotton himself.

In *Com. v. Norton*, 11 Allen (Mass.), 266, it was held, that to obtain money of another by falsely representing to him that on a previous occasion he had omitted to return the proper change to the person making the representation, and thereby inducing him to correct the supposed mistake, is not within the statute.

For other cases in which it was held that the false pretenses were so transparent, and so little calculated to deceive a person of ordinary prudence as not to be within the statute, see 4 Hill, 9; 46 Me., 150; 7 Eng. (Ark.), 65.

The rule of
manner: "I
false pretense
tests or other
becomes a false
the ingredient
explosive but
was not to be
tests of chem
stitute a false
tion that it h
sentation ma
in analogy to
On the oth
representation
so a represe
property, is
142. The co
statute was p
unsuspecting
10 Harris (P

EMBEZZLEM

A collector o
the pew
congreg
fraudul
property

BERRY,
officer, ag
any clerk
copartner
his own
master, an
possession
he shall b
indictmen
erty charg

The rule on this question is laid down in *Re Greenough*, 31 Vt., 279, in this manner: "It may in truth be said, that every false representation is not a false pretense, but if it requires something to be done, by the application of tests or otherwise, to ascertain whether the representation is false, it then becomes a *false pretense*. In this case it was matter of experiment whether the ingredients specified in the *recipe* would produce as a compound a non-explosive burning fluid. The falsity of the representation by Greenough was not to be discovered by ocular inspection of the ingredients, but by the tests of chemical analysis, or actual experiment. The representation to constitute a *false pretense* must be of an existing fact, it is true, yet it is no objection that it has relation to a future event. * * * We apprehend the representation made by Greenough did constitute a *false pretense* within the statute, in analogy to repeated decisions."

On the other hand it was *held*, in *State v. Dorr*, 33 Me., 498, that a false representation that property was unincumbered was within the statute. And so a representation that a mortgage offered for sale is a first lien on the property, is an indictable false pretense: *People v. Sully*, 5 Park. Cr. (N. Y.), 143. The court say: "All men are not equally prudent or cautious, and the statute was passed for the protection of the weaker and more credulous and unsuspecting part of mankind." To a similar effect are cases to be found in 10 Harris (Pa.), 256; 9 Ad. and E. (N. S.), 270; 14 Wend., 537; 14 Ill., 348.

STATE v. KENT.

(22 Minn., 41.)

EMBEZZLEMENT: *Agent entitled to deduct his commission out of receipts—Joint owner.*

A collector of pew rents for a church, who is entitled to "five per cent of all the pew rents, no matter who collected them," is a joint owner with the congregation of the pew rents, and is not guilty of embezzlement in fraudulently converting the pew rents to his own use. They are not the property of *another*, within the meaning of the statute against embezzlement.

BERRY, J.: Section 23, ch. 95, Gen. Stat., enacts that "if any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any copartnership, * * * embezzles or fraudulently converts to his own use, * * * without consent of his employer or master, any money or property of another, which has come to his possession or is under his care by virtue of such employment, he shall be deemed to have committed larceny." To sustain an indictment under this section of the statute, the money or property charged to have been embezzled, or fraudulently converted,

must be the money or property of another than the person indicated.

The defendant was collector of pew rents for a church corporation, and acted as such, under a special and express agreement, by which, as compensation for his services, he was to have "five per cent of all the pew rents, no matter who collected them." The effect of this agreement was to vest in defendant an undivided one-twentieth interest in the rents collected, and to that extent to make him an owner of the same, jointly with the corporation. In other words, the rents collected were not the money or property of the corporation, but the joint property of the corporation and the defendant. They were, therefore, not the property of *another* than the defendant. It follows that the defendant is not properly indictable, under the section of the statute before cited, for his alleged embezzlement and fraudulent conversion of the same, or any part thereof: *Holme's Case*, 2 Lewin, 256, cited 2 Archbold Cr. Pr. and Pl., 569, note; *Reg. v. Bren*, cited 2 Bish. Cr. Law, § 335, note 3; *Rea v. Hoggins*, Russ. and Ryan, 145; *Com. v. Stearns*, 2 Met., 343, 349; *Com. v. Libbey*, 11 Met., 64; *Com. v. Foster*, 107 Mass., 221; 2 Bish. Cr. Law, §§ 355, 356.

This conclusion practically disposes of the case in defendant's favor. Were it necessary for us to pass upon the other points presented in the argument, we should be much inclined to doubt whether, independent of the agreement, the course of dealing between the corporation and the defendant, by which the former acquiesced in his practice of depositing the rents collected on his own general account, and of treating the deposits as his own, was not such as to divest the corporation of its specific property in the deposits, and to establish between it and the defendant the simple relation of creditor and debtor. See *Com. v. Libbey*, 11 Met., 64; *Com. v. Stearns*, 2 Met., 343. If this doubt be well founded, the result would be the same as that before reached upon the construction of the agreement.

Judgment and order refusing new trial reversed.

EMBEZZLEMENT

Where money
year at te
own use,
guilty of
interest, a
ment is c
In a prosecu
other dist

PER CURIAM

Kane coun
trial of the
to the penit

It appear
cause, that
placed in th
rate of ten
money, whi

"Receive
lars, to be l

One hun
9th day of
paid on th
The balance
use.

If the m
loaned for
annum, and
the defend
If, on the c
the defend
upon the g
from the ti
be had. V

KRIBS v. PEOPLE.

(82 Ill., 425.)

EMBEZZLEMENT: *Distinction between embezzlement and breach of contract—Evidence—Proving other embezzlements.*

Where money is placed in the hands of the respondent, to be loaned for one year at ten per cent interest, and a part of it was by him converted to his own use, if the defendant acted merely as an agent in the matter he is guilty of embezzlement; but if he guarantees the payment of ten per cent interest, and is personally liable for the repayment of money, no embezzlement is committed.

In a prosecution for embezzlement it is error to allow evidence to be given of other distinct embezzlements.

PER CURIAM: This was an indictment in the circuit court of Kane county, against John C. Kribb, for embezzlement. On a trial of the cause, the defendant was found guilty and sentenced to the penitentiary for one year.

It appears, from the evidence introduced on the trial of the cause, that George U. Shaver, on the 26th day of June, 1874, placed in the hands of the defendant \$550, to be loaned at the rate of ten per cent for one year. A receipt was given for the money, which was as follows:

"ELGIN, ILL., June 26, 1874.

"Received of George U. Shaver, five hundred and fifty dollars, to be loaned at ten per cent, for one year from this date.

"JOHN C. KRIBB."

One hundred and fifty dollars was paid back to Shaver on the 9th day of November, 1874, and at the same time interest was paid on the entire amount to the 1st day of December, 1874. The balance of the money the defendant converted to his own use.

If the money was placed in the hands of the defendant to be loaned for one year, upon real estate security, at ten per cent per annum, and he fraudulently converted the same to his own use, the defendant would, no doubt, be guilty of the offense charged. If, on the other hand, Shaver placed the money in the hands of the defendant and looked to him for a repayment, and relied upon the guaranty of the defendant for ten per cent interest from the time the money was paid over, then no conviction could be had. While we do not propose to express any opinion on the

evidence, yet the fact that the defendant guaranteed ten per cent interest from the date the money was received, and the subsequent payment of interest on the money to December 1, 1874, in connection with the agreement to repay the \$400 on thirty days' notice, may properly raise a well founded doubt in regard to the guilt of the defendant.

The proposition is too plain to admit of argument, that if Shaver, when he gave the money to the defendant, relied upon his honesty or responsibility to return it, with ten per cent interest, he can not resort to the criminal laws of the state to assist him to collect the debt.

But, aside from these considerations, the record discloses an error for which the judgment of the circuit court must be reversed.

On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment, the law did not require him to come prepared to meet other charges, nor does it follow because he may have been guilty of other like offenses, that he was guilty of the offense charged in the indictment.

The evidence should have been confined strictly to the offense charged in the indictment. This was not, however, done, but improper testimony was allowed to go to the jury, which could not fail to prejudice the rights of the defendant.

For the error in the admission of improper evidence, the judgment will be reversed and the cause remanded.

Judgment reversed.

NOTE.—An agent who converts to his own use money intrusted to him by his principal for the purchase of land, is guilty of embezzlement: *State v. Healy*, 48 Mo., 531.

In *Com. v. Foster*, 107 Mass., 221, the evidence was as follows: The prosecutor delivered two notes to the defendant, on the special agreement of the defendant to sell the notes and pay over the proceeds to a brother of the prosecutor's, charging a commission for his services. It was held that if the defendant was employed merely to sell the notes, receive the proceeds, and pay the same specifically over to the brother, without any authority to mix them with his own funds, a fraudulent conversion of them would be embezzlement.

In *State v. Foster*, 37 Iowa, 404, S. C., 1 Am. Crim. Rep., 146, it was

decide
embezz
the pr
could
pay th
guilty
People

EMBEZ

Under

or
wi
gu
th
th
th
tru

The fu

by
w
w
pr
ba

And i

ha
gc
gc
ar
de

Ex

Oth

P. C.

and E

At

829,

MA

dent,

secur

prop

decided that under an indictment founded on the ordinary statute against embezzlement, evidence that the prosecutor gave the prisoner a watch, which the prisoner, as agent for the prosecutor, was to trade for a wagon when he could find a suitable opportunity, and for which service the prosecutor was to pay the prisoner \$5.00, shows a sufficient employment to make the prisoner guilty of embezzlement in converting the watch to his own use. See note to *People v. Husband*, p. 111.

PEOPLE v. HUSBAND.

(86 Mich., 806.)

EMBEZZLEMENT: *Inn-keeper — Fraudulent conversion of baggage — Symbolical delivery — Effect of inn-keeper's lien.*

Under the statute (1 Laws 1875, p. 195), making one to whom money, goods, or other property the subject of larceny shall have been delivered, and who shall embezzle or fraudulently convert the same to his own use, etc., guilty of larceny, it is a sufficient delivery of trunks and baggage where the checks for the same are delivered to respondent, and he, acting under the authority which the delivery of such checks gave him, has assumed the right to and has exercised acts of possession and control over the trunks and baggage.

The fact that a hotel-keeper, to whom checks for baggage have been delivered by a guest, would have a lien upon the baggage for the bill of such guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the same to his own use, or of itself preclude his being held under said statute, on the ground that he was a bailee, with a special property in the goods.

And instructions to the jury, that in case they found defendant claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods, are as favorable in this regard to the respondent as he is entitled to demand.

EXCEPTIONS from Kent circuit.

Otto Kirchner, attorney-general, for the people, cited: 2 East P. C., 555; *Rex v. Williams*, 1 O. and K., 195; Archb. Cr. Pr. and Pl. (notes), p. 361-2 (2).

Atwood & Corbitt, for respondent, cited: 2 Bish. Crim. L., 829, and cases cited; *Leake v. The State*, 10 Humph., 479.

MARSTON, J.: An information was filed against the respondent, charging him with having fraudulently and feloniously secured and converted to his own use certain trunks and other property of the value of fifty-five dollars, without the consent of

the owner thereof, and that he thereby, in manner and form aforesaid, feloniously did steal and carry away the same contrary to the statute, etc.

The statute, under which the information was filed, reads as follows:

"If any person to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete, with intent to embezzle, or fraudulently use such goods, money, or other property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of larceny:" *Act No. 168, Laws 1875, vol. 1, p. 195.*

The evidence introduced tended to show that the respondent was a hotel-keeper, and that as such he had received from the complaining witness, who was stopping at his house, three checks, being the checks to her trunks then at the depot, with a request that he bring the trunks to the house; that complainant remained at his house some five weeks; that although she ascertained that her trunks had been removed from the depot, the same had not been brought to the respondent's house; that respondent, in the mean time, had been to Detroit, and on his return she spoke to him about her trunks, when he informed her they had been sent to Detroit, but he would have them back in a day or two.

Evidence was also given that on April 24th, 1876, some eight days after respondent had received the checks he was in Detroit, and that he then handed the checks to the proprietor of a hotel in that city, who handed them to one of the hotel porters; that respondent then asked the porter to bring the baggage which the checks represented to the house, which was done; that respondent left the hotel before the baggage was brought in, and did not return; and that the baggage thus brought into the hotel in Detroit was the trunks and property of the complainant.

The property was afterwards found in the Detroit hotel, where it was detained for respondent's hotel bill. Other evidence was introduced, but the above is sufficient in order to enable us to understand the questions raised. The respondent was convicted, and the case comes here upon exceptions, before sentence. It is insisted that the property was in the hands of the respondent as bailee; that he had a special property in the goods, and that under such circumstances they were not the subject of larceny;

also, that
that the
remained

It is tru
responden
did delive
and posses
ity which
cise acts o

The evi
erty, as m
from the
tion of the
the same
hotel, and
amount sh
under the
as his own
would sho
jury were
the case
that the r
instructed
lute cont
that such
him. Th
version, t
dent to h
of such a
her proper
found an
that respo
erty as hi
the intent
absolutely
this the of
instructed
upon the
by virtue
in good fa
her goods.

VOL.

also, that the property was never delivered to the respondent; that the checks only were delivered, and that the property remained in the possession of the railroad company.

It is true that the complaining witness did not deliver to the respondent the actual manual possession of the property, but she did deliver to him that which gave him the right to the control and possession of the property, and that, acting under the authority which she gave him, he assumed the right to it, and did exercise acts of possession and control over it.

The evidence tended to show that the disposition of the property, as made by him, was not only without authority in fact from the owner thereof, but that it was in fact in direct violation of the authority she had given him, and was a conversion of the same to his own use. The fact that she was a guest at his hotel, and that he would have a lien upon this property for the amount she might be owing him, would not give him authority, under the facts appearing in this case, to dispose of the property as his own. His good faith and belief that he had such right would show a want of any criminal or wrong intent, and the jury were so instructed. An examination of the charge shows the case to have been presented to the jury in such a form that the respondent has no legal cause of complaint. They were instructed, in case they found that the respondent had absolute control over the property, by means of the checks, that such would be a sufficient delivery of the possession to him. They were also instructed, that in order to find a conversion, they must find an actual conversion by the respondent to his own use, and also an intent existing at the time of such actual conversion, to thereby deprive the owner of her property therein, and to use it himself—that in case they found an actual possession and actual conversion in Detroit, and that respondent there assumed absolute control over the property as his own goods, they must also find, in order to convict, the intent thereby to deprive the owner of her property therein, absolutely and entirely—that if he had any intent other than this the offense would not be made out. The jury were further instructed, that in case they found he claimed to have a lien upon the goods, and thought he had a right to pledge the goods, by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods.

As we discover no error, it must be so certified to the circuit court, and that judgment be entered on the verdict.

The other justices concurred.

NOTE.—It will be observed that the decision in this case is based upon the Michigan statute, which is quoted in full in the opinion of the court. This statute is very much broader than the old statute against embezzlement, which applied only to "clerks, apprentices, servants, and agents," within neither of which designations was a bailee, or one who received the property under an honest contract, included. And, therefore, under the old statute a bailee cannot be convicted of embezzlement, although he might of larceny, if he had the intent to steal the goods at the time they were delivered to him.

In *Com. v. Young*, 9 Gray, 5, it appeared that leather and other materials were delivered to one Bowen, to be made up into shoes by him, in his own shop, for the prosecutors, and that instead of using them for that purpose he sold them and converted the proceeds to his own use. It was held that this did not constitute embezzlement; and in *People v. Burr*, 41 How. (N. Y.) Pr., 293, on similar facts it was held that the respondent was not guilty of embezzlement, the decision being put expressly on the ground that he was a bailee, and therefore not within the act.

And so in *Com. v. Williams*, 9 Gray 461, it was held, that one was not guilty of embezzlement, under the old statute, on the following state of facts: The prosecutor went into a boarding-house kept by the defendant (with whom he had previously boarded, but did not then board), and handed him a roll of bank-bills, saying, "Keep this till to-morrow morning for me." On the following morning the defendant denied ever having received the money, and refused to give it up, and fraudulently converted it to his own use.

In *Com. v. Butterick*, 100 Mass., 1, it is held that "the disposal of collateral security by the holder, before the debt of which it was deposited with him to secure the payment becomes due and payable to him. * * * is not indictable as embezzlement under Gen. Stat., c. 161, sec. 35.

For other authorities on this topic, see note to *Kribs v. People*, p. 109.

KRIBS v. PEOPLE.

(81 Ill., 599.)

EMBEZZLEMENT: Indictment—Distinction between embezzlement and larceny.

Under a statute against embezzlement, which provides that "whoever embezzles, etc., * * * shall be deemed guilty of larceny, an indictment charging simply an ordinary larceny is insufficient, and no conviction of an offense under the statute can lawfully be had.

An indictment, under such a statute, must set out the facts constituting the embezzlement, and then aver that so the defendant committed the larceny.

Nothing which was larceny at common law is included within the statutes against embezzlement.

Mr. Jus
It is not
guilty tha
Code, ent
ever emb
secretes, w
own use,
may be t
deemed g

The ind
The uni
and in En
embezzlen
the larcen
ton's Crim
Archbold
Cases, p. 4

The de
ing featur
cially aver
8 Cal., 42
247; *Com*
gan, 665;
and S., 52
rule, inste
eighty-two
vides that
embezzlen
indictmen
with such
company,
any partic

We are
The Peo
Id., 397,
embezzlen

This is
in those c
The co
and no qu
to embez

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court.

It is not claimed by the state that the defendant is otherwise guilty than under the seventy-fourth section of the Criminal Code, entitled "Embezzlement," which is as follows: "Whoever embezzles or fraudulently converts to his own use, or secretes, with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny."

The indictment is for larceny, simply, as at common law.

The uniform construction of similar acts, both in this country and in England, is, "that the indictment must set out the acts of embezzlement, and then aver that so the defendant committed the larceny." 2 Bishop's Criminal Procedure, § 281; 2 Wharton's Criminal Law (ed. of 1841), 281, 282, 283; 3 Waterman's Archbold on Practice, Pleadings and Evidence in Criminal Cases, p. 446, 1, 2, 3, 4, 5, 6, and notes.

The defendant's fiduciary character, which is the distinguishing feature between embezzlement and larceny, must be specially averred: *Com. v. Simpson*, 9 Metc., 13; *People v. Cohen*, 8 Cal., 42; *Com. v. Smart*, 6 Gray, 15; *Com. v. Wyman*, 8 Metc., 247; *Com. v. Merrifield*, 4 Id., 468; *People v. Tryon*, 4 Michigan, 665; *People v. Allen*, 5 Denio, 76; *Rex v. Johnson*, 3 M. and S., 539; *Rex v. Creighton, Russ. and Ry.*, 62. And this rule, instead of being changed, is expressly recognized by section eighty-two of the Criminal Code (R. L. 1874, p. 364), which provides that, in indictments, in cases under the statute relating to embezzlements, "it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with such intent, of funds of such person, bank, incorporated company, etc., to a certain value or amount, without specifying any particulars of such embezzlement."

We are referred, however, by the attorney-general, to *Welch v. The People*, 17 Ill., 339, and *Stinson et al. v. The People*, 43 Id., 397, as settling the law in this state, that evidence of an embezzlement will authorize a conviction for larceny.

This is a misapprehension as to the effect of what was decided in those cases.

The convictions there were for larcenies, as at common law, and no question was raised or discussed under the statute relating to embezzlements, and it was *held*, in both cases, the evidence

authorized the jury in finding that the defendant, in obtaining possession of the property, in the first instance, did so with a felonious intent. The distinction between larceny and obtaining goods under false pretenses, was the turning point in each case, and it was thus pointed out in Stinson's case: "If the owner of goods alleged to have been stolen, parts with both the possession and the title to the goods, to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud; it is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny, if the goods were obtained with that intent."

But the section of the Criminal Code quoted, relates to a class of cases which were not larceny at common law. It is said by eminent writers on criminal law, that the statutes in relation to embezzlement "were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that was larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law:" 2 Wharton's Criminal Law (7th ed.), 1905.

Here the defendant sold a town or city lot for the prosecutor, and under his instructions, previously given, it was defendant's duty to loan the money at interest, on good security, for the prosecutor; but, instead of complying with these instructions, he lost the money at gaming. The prosecutor never had the money in his possession at any time, and, therefore, at common law, the offense could not have been larceny: 2 Wharton's Criminal Law (7th ed.), §§ 1830, a (p.), 1846, b (g.)

The evidence not being sufficient to sustain the conviction for larceny, the judgment must be reversed.

Judgment reversed.

EMBEZZLEMENT
Practice
strict att
nary ex
elect — V

Since the an
consin,
what n
exhibite

A formal ad
magistr
and tha
not req
for filin
(or a wa
bail, or

Under ch. 18
mitted,
offense
any off
accused
informa
the accu
a misde

The fact tha
the info
The Stat
of such
abatement
plea, the

It is a matt
attorney
informa
be rever

In an inform
a fraudu
sion as n
of money
counts v
error in
was in, e

Defendant b
their sal
terms an
getting i

STATE v. LEICHAM.

(41 Wis., 505.)

EMBEZZLEMENT: Larceny by agent — Informations — Constitutional Law — Practice — Preliminary examination; what sufficient — Discretion of district attorney as to crime to be charged in information — Absence of preliminary examination; how shown — Several counts; compelling prosecution to elect — What evidence is a sufficient basis for filing an information.

Since the amendment, in 1870, of sec. 8, art. 1, of the Constitution of Wisconsin, the legislature seems to have full power to prescribe by whom, in what manner, and under what circumstances, an information may be exhibited against any person for any criminal offense.

A formal adjudication, after a preliminary examination by the committing magistrate that the offense charged in the complaint has been committed, and that there is probable cause to believe the accused guilty thereof, is not required (R. S., ch. 176, sec. 19; Tay. Stats., 1920, § 19), as a basis for filing an information, but it is enough that, upon such examination (or a waiver thereof), the accused has been, by such magistrate, held to bail, or committed, to answer for an offense.

Under ch. 190, of 1875, where the accused has been thus held to bail or committed, the information filed by the district attorney need not be for the offense charged in the complaint before the magistrate, but may be for any offense which the testimony taken on the examination shows the accused to have committed; but the district attorney may exhibit an information as for a felony, if in his opinion the testimony so taken proves the accused guilty thereof, though the magistrate may find him guilty of a misdemeanor only.

The fact that there has been a preliminary examination need not be stated in the information, or shown affirmatively by the prosecution (*Peterson v. The State*, unreported); and when the defendant relies upon the absence of such an examination, it seems that the better practice is to plead it in abatement before pleading to the merits; and, if issue is joined on such a plea, the burden of proof is upon the accused.

It is a matter within the discretion of the trial court, whether the district attorney shall be required to elect upon which of several counts in the information he will proceed, and the determination of that court will not be reversed, except for an abuse of discretion.

In an information under sec. 27, ch. 163, R. S., one count was for larceny by a fraudulent conversion of *chattels*, which came into defendant's possession as an agent, and a second count was for larceny by a like conversion of *money* received by him as such agent; and it was admitted that both counts were based upon the same transaction. *Held*, that there was no error in refusing to require the prosecution to elect, before the evidence was in, on which count it would proceed.

Defendant being in possession of certain machines as agent of the owners for their sale, etc., and bound by his contract with them to sell upon certain terms and conditions, sold to M. some of said machines for the purpose of getting money from M. with which to pay, and with which, pursuant to

a stipulation with M., he did immediately pay, an indebtedness of his own, for which M. was surety. M. took and held possession of the machines, having stipulated with defendant that the latter might purchase them back by repaying the money so advanced. These transactions were without the consent or knowledge of defendant's principals, and in violation of the terms of his contract with them, and he has never accounted to them for such machines; and the evidence excludes the supposition that he did not know that the machines were their property, which he was converting to his own use. *Held*, that the fact (if shown) that defendant believed, when he converted the property, that he would be able to pay, and intended to pay, the owners for it when he should be required to account for it, does not relieve the act of its fraudulent and criminal character.

The foregoing facts being proven, the court did not err in refusing to charge that if defendant so construed the written contract (with his employers) that he honestly supposed he had a right to sell the machines and use the proceeds, and afterwards account to the owners; and if, in the transaction, he acted under that impression and in good faith, the jury should not find him guilty.

Nor was it error to instruct the jury, in such a case, that if, at the time alleged, defendant sold any of said machines, or turned them out as security for the purpose of paying his own indebtedness, without the consent of his principals, he was guilty as charged in the first count of the information.

The case distinguished from *Com. v. Stearns*, 2 Met., 343, and *Com. v. Libbey*, 11 Id., 64, decided under a like statute, by the fact that there was here a special agency, and that the right of property and the possession remained in the principals.

Whether ch. 85 of 1873 supersedes in a case like this, sec. 27, ch. 165, R. S., under which the information was drawn, and reduces the offense to a misdemeanor, and whether, consequently, only the punishment prescribed by the act of 1873 can be inflicted, cannot be determined upon exceptions taken before judgment, but only on an appeal from the judgment.

On exceptions from the circuit court for Sank county.

An information was filed in the circuit court, by the district attorney, under sec. 27, ch. 165, R. S. (Tay. Stats. 1844, § 30), charging that the defendant had committed the crime of larceny, by fraudulently converting to his own use three seed-sowers or cultivators, of the value of \$225, the property of the copartnership of Van Brunt, Barber & Co., which machines came into his possession by virtue of his employment by that firm as its agent to sell the same. The information contains a second count under the same statute, for the fraudulent conversion of \$130 of the money of such firm, received by the defendant as such agent, by virtue of such employment.

At the commencement of the trial the defendant moved the

court to read the information. The district attorney's conviction, all in he el the first co

The jury, the court o for a new t to certain m ters of law reduced to accordance

The def and the ci exceptions

A furth upon by th

Burr L tion befor

"improper 1873, and tively sli the district mation dra punishable less than a

It is tru triet attor

(1) Even files an in taken on mony, in statute of Wis., art. the natur constituti the discret informati those char it should

court to require the district attorney to elect on which count of the information he would proceed, but the court refused to do so. The district attorney conceded, however, that there could be a conviction on but one of the counts, and after the testimony was all in he elected to abandon the second count, and to proceed on the first count alone.

The jury found the defendant guilty on the first count, and the court overruled a motion in arrest of judgment and a motion for a new trial. Thereupon the defendant exhibited exceptions to certain rulings and directions of the court on the trial in matters of law, which exceptions were, during the same term, reduced to writing, and allowed and signed by the judge, in accordance with the statute: R. S., ch. 180, sec. 7.

The defendant duly recognized, as required by section nine, and the circuit court granted a stay of proceedings until the exceptions should be determined by this court.

A further statement of the case, with the exceptions relied upon by the defendant, will be found in the opinion.

Burr H. Jones, for the defendant, argued that the examination before the magistrate having been upon a charge of "improperly disposing of property by an agent," under ch. 85 of 1873, and that being only a misdemeanor, to which a comparatively slight punishment is attached, it was not competent for the district attorney to bring the defendant to trial upon an information drawn under sec. 30, ch. 165, Tay. Stats., for a felony punishable, as the prosecution claims, by confinement for not less than a year in the state prison.

It is true that ch. 190 of 1875 purports to confer upon the district attorney a very wide and a very dangerous discretion; but, (1) Even under that statute he exceeds his jurisdiction, when he files an information not supported by the "written testimony" taken on the examination; and it is submitted that such testimony, in this case, did not support a charge of larceny. (2) The statute of 1875 is subject to the declaration of rights (Const. of Wis., art. 1, sec. 7), which gives the accused the right to know the nature and cause of the accusation against him; and this constitutional right is meaningless if there is not some limit to the discretion which the prosecuting officer may exercise in filing informations for offenses of a different character and grade from those charged; and, if there is any limit, this is a case in which it should be defined. 2. That ch. 85 of 1873 in part repeals the

earlier statute; or that, at least, where the trial discloses a state of facts and an offense such as is covered by the act of 1873, even though it may also be under the terms of the earlier statute, the lighter punishment imposed by the later statute can alone be inflicted: *Serinagrou v. The State*, 1 Chand., 48. 3. That the circuit court had no jurisdiction, because the defendant had not been held to trial by the *lawful* order of an examining magistrate. The record of the examining magistrate states that he "finds, from the testimony, reason to believe the defendant guilty of larceny." But the statute (Tay. Stats., ch. 196, § 19), requires the magistrate to adjudge "that an offense has been committed, and that there is *probable cause* to believe the prisoner guilty." Such an adjudication is necessary to confer jurisdiction upon the circuit court. The information alone cannot confer jurisdiction, because it cannot lawfully be filed until after such an examination as the statute prescribes: Sec. 7, ch. 137 of 1871. The finding of the magistrate, under the present system, seems no less important and jurisdictional than was the finding of the grand jury under the former system. If, in a mere *quasi*-criminal action, importance is to be attached to the finding of the magistrate, as affecting the jurisdiction of the circuit court (*State v. Braun*, 31 Wis., 601), it would be remarkable that his finding and adjudication should be treated as a mere matter of form in an action like the present. 4. That the court erred in not requiring the prosecuting attorney to elect, before the trial, upon which count of the information he would proceed. In cases of felony, where it is plain, as in this case, that a refusal to compel an election may confuse the prisoner and distract the jury, such refusal is error. If the prisoner must hear a mass of testimony against him, raising vague suspicions of numerous offenses, and must enter upon his evidence in defense, without knowing which of several charges he is to defend against, that constitutional provision which gives him the right to know the nature and cause of the accusation against him becomes a form of idle words: *State v. Fee*, 19 Wis., 565; *State v. Gummer*, 22 *Id.*, 441; 1 Bish. Cr. Pr. (1st ed.), 213; *Id.* (2d ed.), 422.

5. That the court erred in its instructions to the jury, as: (1) In instructing them that, under the contract, the defendant was an agent, whereas the question of agency was one of fact for the jury. (2) In charging, substantially, that if defendant sold the property and used the proceeds without the consent of his

employers that defendant, in his dealing with them, was without judgment, error, committed in the criminal action, and the parties in discretion case, and Defendant contract, a circumstan was guilty indebtedne the genera defendant

6. That is taken from Met., 343, the intent within it.

The *At* was not er before the Such an el ally distin *State v. G* Several co sible conti close of th rights, and Whart. O ground th taken, (1 179, Tay. ney to fil

(2) It doe tion was l to that ef ficient:

employers, he was guilty of embezzlement; ignoring the fact that defendant had a right to construe the contract for himself in his dealings with his employers, and that though an error of judgment on his part might not avoid a civil liability, yet such error, committed in good faith, might be a perfect defense to a criminal action, the felonious intent being a necessary element of the crime. The evidence shows a course of dealing between the parties in which, notwithstanding the written contract, a large discretion was vested in the defendant, as is almost invariably the case, and necessarily so, where such contracts are entered into. Defendant received different payment from that required in the contract, and in various ways they ratified his acts. Under such circumstances, it was error to instruct the jury that the defendant was guilty if he turned out or sold machines for paying his own indebtedness without the employers' consent. And the error of the general instructions was not cured by giving instructions at defendant's request, submitting to the jury the question of intent.

6. That the statute under which the information was drawn, is taken from Massachusetts, and the cases of *Com. v. Stearns*, 2 Met., 343, and *Com. v. Libbey*, 11 Id., 64, show that it never was the intention of the legislature to include this class of cases within it.

The *Attorney-General*, for the state, contended: 1. That it was not error to refuse to compel the district attorney to elect, before the evidence was in, upon which count he would proceed. Such an election is never required unless the counts are for actually distinct offenses, and may confuse the defendant or the jury: *State v. Gummer*, 22 Wis., 441; *Miller v. The State*, 25 Id., 384. Several counts may be necessary to enable the state to meet possible contingencies in respect to the evidence; an election at the close of the evidence is sufficient to secure the defendant all his rights, and the matter is always in the discretion of the court: Whart. Cr. L., §§ 422, *et seq.* 2. That the objection on the ground that there was no preliminary examination, was not well taken. (1) The statute is directory in that respect, and § 23, ch. 179, Tay. Stats. (1930), recognizes the right of the district attorney to file an information without a preliminary examination. (2) It does not affirmatively appear that no preliminary examination was had: *Peterson v. The State*, unreported. A statement to that effect in the motion in arrest of judgment is not sufficient: *Griswold v. The State*, 24 Wis., 144. Nor does it

appear that defendant was not a fugitive from justice, and thus within the exception of § 22, *Peterson v. The State*. (3) There was in fact a preliminary examination, and the proceedings before the examining magistrate form part of the record. The examination was for the same offense, in substance, that is charged in the information, and is a compliance with the statute, ch. 190, Laws of 1875. 3. That there was no error in giving or refusing instructions. The law implies the intent from the act. The giving of the bill of sale was a conversion, fraudulent in its effects; a fraudulent use of the property to the injury of the owners. Good intentions in respect to redeeming or saving the owners harmless, are of no avail. Such a construction would virtually repeal all statutes in relation to embezzlement: *United States v. Taintor*, 11 Blatchf., 374. 4. That ch. 85 of 1873 did not repeal or affect § 30, ch. 165, Tay. Stats. The former refers to a sale of property by the agent on terms not authorized by the owner, and does not refer to a fraudulent conversion or embezzlement.

LYON, J.: It is claimed that there was no preliminary examination of the defendant for the crime charged in the information, and hence that the district attorney had no authority to file the information, and that the defendant was illegally tried under it for the offense charged therein. The only ruling of the court which presents this question, is the denial of the motion in arrest of judgment found in part upon such alleged absence of a preliminary examination.

Before the information was filed, a complaint in writing under oath was made to a justice of the peace, against the defendant, charging him with having disposed of two seed-sowers or cultivators contrary to the written or printed instructions of Van Brunt, Barber & Co., his principals and the owners of the machines, by means whereof that firm sustained damage, etc. This complaint evidently charged an offense under ch. 85, Laws of 1873, and was drawn with reference to that statute. A criminal warrant was issued on such complaint by the justice, and the defendant was arrested and brought before the justice, and a preliminary examination was had. The testimony taken on such examination tends to show the defendant guilty of the offense charged in the information. The justice entered a finding and order as follows: "The court finds, from the testimony, reason

to believe statutes of for his ap county." tion, with justice to the record it is not n lawfully fi justice, w magistrate purposes Laws of 1

Since tl 1 of the tions have legislature what man be exhibit case of fu power to in the di stated) th examinati trate, and before an

It is no defendant trate that able caus does not § 19). If bail or co offense ha him guilt commits stantially case certa v. Braun trine, are bastardy

to believe the defendant guilty of larceny as defined in the statutes of Wisconsin, and he is held to bail in the sum of \$500 for his appearance at the next term of the circuit court for Sauk county." The proceedings before the justice on such examination, with the testimony taken thereon, were returned by the justice to the circuit court, and have been sent to this court with the record of the case. In the view we have taken of the case, it is not necessary to determine whether a district attorney may lawfully file an information against a person not a fugitive from justice, without a preliminary examination before a committing magistrate. Probably he has no authority to do so, and for the purposes of this case it will be assumed that he has not. See Laws of 1871, ch. 137, sec. 7 (Tay. Stats., 1930, § 22).

Since the adoption, in 1870, of the amendment to sec. 8, art. 1 of the constitution, by virtue of which amendment informations have, to a great extent, taken the place of indictments, the legislature seems to have full power to prescribe by whom, in what manner, and under what circumstances, an information may be exhibited against any person for any criminal offense. In the case of fugitives from justice, the act of 1871, *supra*, vests the power to file an information without a preliminary examination in the district attorney. In other cases, we assume (as before stated) that, under such act, there must have been a preliminary examination for a criminal offense before a committing magistrate, and a commitment or holding to bail to answer therefor, before an information could lawfully be filed.

It is not essential, as claimed by the learned counsel for the defendant, that there shall be a formal adjudication by the magistrate that the offense has been committed and that there is probable cause to believe the accused guilty thereof. The statute does not so require: R. S., ch. 176, sec. 19 (Tay. Stats., 1920, § 19). It simply directs the magistrate to hold the accused to bail or commit him, when it shall be made to appear that an offense has been committed and there is probable cause to believe him guilty; and the fact that the magistrate holds to bail or commits is equivalent to such formal adjudication. It was substantially so held in *Rindskopf v. The State*, 34 Wis., 217, in which case certain remarks in the opinion in *The State ex rel. Dilworth v. Braun*, 31 Id., 600, relied upon as asserting a different doctrine, are qualified or explained. These were cases under the bastardy act; but so far as the necessity of a formal adjudica-

tion is concerned, the doctrine of the Rindskopf case is applicable to this or any other criminal case.

It may further be assumed that, under the act of 1871, the district attorney could only file an information for the offense for which the accused was committed or held to bail, and that if he exhibited an information for another offense, such information would, in a proper proceeding, be adjudged invalid.

But the act of 1871 has been modified in an important particular, and the powers of the district attorney in respect to the filing of informations greatly enlarged, by subsequent legislation. Ch. 190, Laws of 1875, authorizes the district attorney, after an examination for a criminal offense which results in a commitment of the accused or in holding him to bail, "to file an information setting forth the crime committed according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the same offense charged in the complaint on which the information was had or not."

Manifestly, under this statute, if the accused has had a preliminary examination before a committing magistrate, and has been committed or held to bail by such magistrate, the district attorney may exhibit an information against the accused, and bring him to trial, for any criminal offense which the testimony taken on the examination shows that he has committed. And we think the district attorney is not bound by the opinion or even the adjudication of the magistrate upon the testimony, as to what crime has been committed by the accused. The complaint (as in the present case) may be for a misdemeanor, and the magistrate may find that the accused is guilty of a misdemeanor only; yet, if the testimony on the examination shows that he is guilty of a felony, the district attorney may lawfully file an indictment for a felony.

The rule would be the same were the conditions reversed. If the complaint and finding were for a felony, and the testimony showed that the accused was guilty of a misdemeanor only, the district attorney would be justified in filing an information for the misdemeanor and in refusing to file one for the felony. In the latter contingency, however, it would probably be the duty of the district attorney to file with the clerk of the court a statement of his reasons for such refusal, as required in the act of 1871, sec. 6.

A remark may here be made concerning the amount of proof

necessary
for an o
think the
are gove
is to say,
the infor
cause to

In the
taken do
offense c
is probal
follows t

We m
there are
ought no

We ha
the distr
criminal
the accu
committe
the exam
the only

Whene
nation, v
cannot la
a prelimi
to bail o
fugitive
ent rule
sec. 7 (T
indicated
been no
defendan
exhibite

In the
had occa
views as
the follo
was esse
be filed
been suc

necessary to authorize the district attorney to file an information for an offense other than that charged in the complaint. We think the rule of the statute by which committing magistrates are governed (R. S., ch. 176, sec. 19), should be applied. That is to say, the testimony should show that the offense charged in the information has been committed, and that there is probable cause to believe the accused guilty thereof.

In the present case, the testimony on the examination was taken down very imperfectly; yet we think it shows that the offense charged in the information was committed, and that there is probable cause to believe the defendant guilty thereof. It follows that the information was properly filed.

We might here dismiss the exception under consideration, but there are questions of practice or procedure involved, which ought not to be passed over without remark.

We have thus far considered the case upon the hypothesis that the district attorney cannot lawfully file an information for a criminal offense, except in case of a fugitive from justice, unless the accused has been examined for some criminal offense, and committed or held to bail by the examining magistrate; and that the examination returned with the record in the present case is the only basis for the information.

Whenever the question shall be fairly presented for determination, very probably it will be held that the district attorney cannot lawfully file an information for a criminal offense without a preliminary examination or a waiver thereof, and the holding to bail or commitment of the accused, except in the case of a fugitive from justice. We do not now perceive how any different rule can prevail under the statute: Laws of 1871, ch. 137, sec. 7 (Tay. Stats., 1930, § 22). Assuming the law to be as here indicated, how shall the fact be made to appear that there has been no preliminary examination? In what manner may the defendant proceed to avoid an unauthorized information exhibited against him.

In the case of *Peterson v. The State* (as yet unreported), we had occasion to consider these questions to some extent, and our views as to the proper procedure in such cases are indicated in the following extract from the opinion: "If such examination was essential in this case before the information could properly be filed (a point we do not here decide), the fact that there had been such an examination need not be stated in the information

or shown affirmatively by the prosecution. The want of an examination is matter in defense or abatement, to be established by the plaintiff in error."

It seems to us that the better practice in such cases is for the defendant to plead the want of an examination in abatement of the information, before pleading to the merits. The district attorney can then take issue on the plea, and the fact can be determined by proofs. The burden of proving his plea is upon the defendant; and his own testimony that he has not had a preliminary examination, or competent proof that, having been examined, he was not committed or held to bail, will be sufficient *prima facie* to prove his plea, and to cast upon the prosecution the burden of showing to the contrary. We do not say that there is no other way in which the want of a preliminary examination may be taken advantage of; we only express the opinion that the practice here indicated is the more regular and orderly, and best accords with the procedure upon indictments at common law and under the former practice.

In this case the defendant did not prove that he had not been subjected to a preliminary examination and held to bail or committed for the precise offense charged in the information. In the absence of such proof, all essential preliminary proceedings must be presumed; and such presumption is not rebutted by the mere fact that the accused had been on some occasion examined for another offense. Hence, if the law of 1875 had never been enacted, we should still be unable to say from this record that the defendant had not had a preliminary examination for the offense charged in the information, and had not been committed or held to bail to answer therefor: *Peterson v. The State, supra*.

We have said more of the exception under consideration than was absolutely necessary to the determination of the questions involved therein, for the reason that the legislation based upon the amendment to the constitution adopted in 1870 has introduced many new features in criminal procedure in this state, and we felt that some discussion of questions which have been argued in this court, but not definitely determined, might be of some service to the bench and bar of the state.

II. The next exception to be considered is to the ruling of the court at the commencement of the trial, refusing to require the district attorney to elect on which count of the information he would proceed.

The court
such election
the court, a
cases be ass
is manifest
can be revis
in *State v.*
listen to th
when they
confound t
the same ef
The rule of

We are o
to compel t
the defend
The testim
had fraudu
tioned in t
have been
count. Bu
fraudulent
tain proper
erty. It
sion was th
for the dis
each, to me
v. The Sta
ant could
compel an

III. Se
jury by th
tain instru
essential t
brief state
proved on

In Janu
and betwe
part, and
appointed
and condit
defendant

The court had power to require the district attorney to make such election. But this is a matter resting in the discretion of the court, and a refusal to compel such election cannot in all cases be assigned as error. It is only in cases where such refusal is manifestly an improper exercise of discretion, that the ruling can be reviewed in the appellate or supervisory court. It is said in *State v. Gummer*, 22 Wis., 441, that "the court will only listen to the request to compel the prosecution to elect in felonies, when they can see that the charges are actually distinct, and may confound the prisoner or distract the attention of the jury." To the same effect is the case of *Miller v. The State*, 25 *Id.*, 384. The rule of these cases is abundantly sustained by the authorities.

We are quite unable to perceive how the refusal by the court to compel the district attorney to elect could possibly confound the defendant in his defense, or distract the attention of the jury. The testimony was all directed to the point that the defendant had fraudulently converted to his own use the machines mentioned in the first count of the information, and all of it would have been admissible had the information contained no other count. Both counts were evidently predicated upon the same fraudulent acts of the defendant, to wit: the conversion of certain property of the prosecutors, or of the proceeds of such property. It might have been uncertain whether the actual conversion was the property or proceeds, and it was entirely competent for the district attorney to insert in the information a count for each, to meet the possible contingencies of the proofs: *Miller v. The State*, *supra*. It seems to us impossible that the defendant could have been prejudiced by the refusal of the court to compel an election. Hence the exception is not well taken.

III. Several exceptions were taken to the charge given to the jury by the learned circuit judge, and to his refusal to give certain instructions proposed on behalf of the defendant. It is essential to a correct understanding of these exceptions, that a brief statement be made of the evidence given and the facts proved on the trial.

In January, 1875, a contract in writing was entered into by and between the firm of Van Brunt, Barber & Co., of the one part, and the defendant of the other part, by which the firm appointed the defendant its agent to sell its seeders, on the terms and conditions, and under the restrictions therein specified. The defendant also thereby accepted such agency, and bound himself

to fulfill, observe and keep such terms, restrictions and conditions. This contract, in all essential particulars, is like the contract considered in *The Williams Mower and Reaper Co. v. Raynor*, 38 Wis., 119, where it was held that the party receiving the property under it was merely the agent or bailee of the other party to sell it, the title remaining in such other party, and the agent was held liable in tort for a conversion of the property. (See pp. 128-9.)

A large number of seeders were shipped by Van Brunt, Barber & Co. to the defendant, pursuant to the contract, some of which were sold by the defendant and accounted for, and others were returned to the firm. One Myers had become surety for defendant on a note which had been sued and prosecuted to judgment and execution against both, and the property of Myers had been seized on the execution. The defendant, being pressed to pay this debt, after some hesitation, sold to Myers three of the seeders received by him under the contract with Van Brunt, Barber & Co., for the purpose of getting money from Myers with which to pay such execution. Myers thereupon paid him \$130 in cash, under an agreement by the defendant to pay the judgment against them with the money, which agreement the defendant at once performed. The defendant stipulated with Myers that he might purchase back the seeders by repaying the \$130, and tried to stipulate (but without success) that Myers should not remove the seeders. Myers took and held possession of the seeders. These transactions were without the consent and knowledge of Van Brunt, Barber & Co., and the defendant has never accounted to them for the seeders sold to Myers. These are the seeders described in the information.

The foregoing facts are proved by the uncontroverted evidence, and are absolute verities in the case. That they show a fraudulent conversion by the defendant, to his own use, of the property described in the information, cannot be doubted. And it is equally clear that such property came to the possession of the defendant, and was under his care, by virtue of his employment as agent of the owners for the sale thereof. Moreover, there is no room in the case for the theory that the defendant supposed he had the right, under his contract with the owners, to convert the property to his own use, and he cannot urge, in justification of his conduct, that he construed the contract as giving him the right, and hence converted the property in good

faith. He owners, by it to his own well knew

There is acted innocent he did not intended to he converted the quality

Neither believed, would be account for conversion crime inherent any mere have been.

The instructed in the case; and behalf of who think the justly to him

The property upon which

The court ant so const that he had thereof, and transaction good faith,

"If you the bill of sale pay for the should be criminal intent

The following "It is no defendant v the property

Vol. I

faith. He knew that he held the property as agent for the owners, by virtue of his employment as such, and he converted it to his own use without the consent of the owners, and, as he well knew, in violation of his duty.

There is nothing in the evidence that tends to show that he acted innocently; nothing which enables us to say that perhaps he did not understand the nature of his acts, and may not have intended to commit a crime. We are compelled to believe that he converted the property to his own use with full knowledge of the quality of the act and the possible consequences.

Neither does the fact (if it be a fact) that the defendant believed, when he converted the seeders to his own use, that he could be able to pay the owners for them when required to account for them, and intended to do so, remove from the act of conversion its fraudulent and criminal character. The fraud and crime inhere in the act, and were not eliminated therefrom by any mere mental process, however amiable or virtuous it may have been.

The instructions given and refused must, of course, be considered in the light of the evidence and of the undisputed facts in the case; and, this considered, we fail to find any error in that behalf of which the defendant can justly complain. Indeed, we think the jury were, in some particulars, instructed more favorably to him than the facts of the case warranted.

The proposed instructions refused, and the instructions given, upon which the exceptions are predicated, are as follows:

The court refused to charge, "If you find that the defendant so construed the written contract that he honestly supposed that he had the right to sell the machines and use the proceeds thereof, and afterwards account to the company, and that in the transaction in question he acted under that impression and in good faith, you should not find him guilty."

"If you find, from the evidence, that at the time of making the bill of sale the defendant intended and expected to be able to pay for the same to the company when his general settlement should be made, and that he acted in good faith and with no criminal intent, you should not find him guilty."

The following instructions were given:

"It is not enough to constitute the offense charged, that the defendant was the agent of the company, and that he converted the property to his own use; but the evidence must show that

the property was fraudulently converted to his own use, or converted with the intent to embezzle.

"If you entertain any reasonable doubt as to whether the defendant intended to defraud the company, he is entitled to the benefit of the doubt.

"Under the written contract, which has been read in evidence, and which it is the duty of the judge to construe, the defendant was, at the time of the alleged embezzlement, the agent of Van Brunt, Barber & Co., for the sale of machines mentioned in the contract, and for receiving and passing over the consideration, whether in notes or money, to the said company.

"If at that time, or before it, he had received machines under the contract and held them for sale, he was bound by his contract to sell them according to the terms of such contract, for money or notes, which were the property of said company.

"It is for you to find whether or not he had received and had on hand, at the time of the alleged embezzlement, the machines in question. If you find he had not, and should find that he sold any of them for the purpose of paying an indebtedness of his own, or pledged or turned them out as security for the purpose of raising money to pay his own indebtedness, without the consent of his principals, it was an unauthorized and fraudulent use of them, or an embezzlement and fraudulent conversion of such as were so used to his own use. And if you find that he did so while the property was in his possession, he is guilty as charged in the first count of the information.

"It would not relieve him from guilt if he intended and expected, at the time of doing so, to pay his principal for them with other money or property, or to repurchase or redeem them of the party to whom they were sold or mortgaged, or to repay the money to the party to whom they were turned out or pledged as security."

It is apparent, from an examination of these instructions, that the rulings of the court, considered with reference to the facts in the case, are in harmony with the views above expressed, and that the exceptions to such rulings cannot be sustained.

IV. The court refused the following instruction :

"The evidence shows that the defendant was not such an agent of the company as is intended by the statute under which the charge is made. I therefore charge you that there is no evidence sufficient to convict the defendant."

The instructions of the court in *People v. Van Brunt*, 64, upon a writ of habeas corpus, held that "the defendant was not such an agent of the company as is intended by the statute under which the charge is made."

The ground upon which the money was paid to the court lay stated with any reasonable property in the case was against the defendant of a newspaper, and was not such property as to require a distinction between the property and the commission to collect the money for a fraudulent purpose, but not in the money collected.

In the case stated, the court held that within the provisions of the statute. The court refused.

V. It is held that the defendant, in this case, is not such an agent of the company as is intended by the statute, ch. 165, so that to a mere review of the case that can be made.

It is not a question, and we can review the case. It is not a question, and we can review the case. It is not a question, and we can review the case.

The instruction was evidently drawn with reference to the decisions of the Supreme Court of Massachusetts, in *Commonwealth v. Stearns*, 2 Met., 843, and in *Com. v. Libbey*, 11 Id., 64, upon a statute like ours. In the first of these cases it was held that "an auctioneer who receives money on the sale of his employer's goods, and does not pay it over, but misapplies it, is not such an agent or servant as is intended by the statute."

The ground of this decision is, that the money so received is the money of the auctioneer, and not of the employer; and the court lay stress upon the fact that the auctioneer was not charged with any misappropriation or unlawful conversion of the specific property intrusted to him. In *Com. v. Libbey* the indictment was against a person employed to collect bills for the proprietors of a newspaper, charging that the accused embezzled and fraudulently converted to his own use the moneys collected by him for such proprietors by virtue of his employment. The court drew a distinction between a special agency, where the right of property and the possession remain in the principals, and the cases of commission merchants, auctioneers and attorneys authorized to collect demands for others, holding that an indictment would lie for a fraudulent conversion of the property in the former case, but not in the latter cases for a fraudulent conversion of the moneys collected.

In the present case the agency was special, and, as above stated, the right of property continued in the principals. Hence, within the rule of the Massachusetts cases, a fraudulent conversion of the property by the agent is a criminal offense under the statute. We think the proposed instruction was properly refused.

V. It was argued at the bar by the learned counsel for the defendant, that the law of 1873, ch. 85, supersedes, in a case like this, the statute under which the information was drawn (R. S., ch. 163, sec. 26), and reduces the offense charged from a felony to a mere misdemeanor, and hence, that the greatest punishment that can be inflicted is that prescribed in the act of 1873.

It is manifest that the exceptions do not and cannot raise this question, for the circuit court will give judgment as the law requires, whether it will be for the less or the greater penalty, and we can only determine the question when called upon to review the judgment.

It is believed that the foregoing observations dispose of all the

exceptions; and it results therefrom that the exceptions must be overruled, and the cause remanded for further proceedings according to law.

By the court. So ordered.

NOTE.—No person can rightfully be put upon his trial for a felony until a *prima facie* case has been made against him by legal evidence, whether the preliminary investigation is by a committing magistrate or a grand jury. And the court before which the trial is to take place is not bound by the preliminary adjudication of the magistrate or grand jury, but has not only the right but the duty, in a proper case, where an objection is seasonably made, to determine whether a proper foundation has been laid for an information or an indictment, by sufficient legal evidence adduced on the preliminary investigation. Every court has control over its own proceedings, and is bound to see that its authority is not used for the purpose of oppression, or its time consumed by frivolous and fruitless inquiries. The authorities cited hereafter fully bear out these views. In the case of indictment it is often impossible to show on what evidence an indictment was found, since the affidavits of the grand jurors are inadmissible for that purpose. But in states where criminal proceedings are by information filed by a public prosecutor on the return of a committing magistrate, who returns the evidence on which the commitment was based to the trial court, no such difficulty can arise.

In *People v. Smith*, 25 Mich., 497, it is held that the information should have been quashed on the motion of the defendant, the depositions returned by the committing magistrate not having been signed by the witnesses, the court saying that, not having been signed, "they stood without legal authentication, and, as a basis for further proceedings, were mere hearsay." This case is followed by *Turner v. People*, 33 Mich., 363.

In *Sparrenberger v. State*, 53 Ala., 486, it is held that a plea in abatement to an indictment, that there was no legal evidence adduced before the grand jury, is good.

In *People v. Restenblatt*, 1 Abb. (N. Y.), Pr., 268, it is held that "an indictment should be quashed when it clearly appears by affidavit that it was found by the grand jury, without adequate evidence to support it." See, also, *U. S. v. Shepherd*, 1 Abb. (N. Y.), Pr. (N. S.), 481.

In *State v. Froiseth*, 16 Minn., 296, an indictment was quashed because it was found on the evidence which the defendant himself had been compelled to give before the grand jury.

In *U. S. v. Coolidge*, 2 Gall., 363, on a motion to quash an indictment because found by the grand jury on the statement of a witness who was not sworn, Story, J., ruled that the indictment must be quashed. He said, "Every indictment is subject to the control of the court, and this indictment, having been found irregularly, and upon the mere statement of a witness without oath, which was not evidence, a *cassetur* must be entered."

And in *Ashburn v. State*, 15 Geo., 240, an indictment was quashed because the witnesses before the grand jury were not properly sworn, the court saying that the presentment and indictment were "founded on what was not evidence—in other words, were without foundation. They were, therefore, void." And this doctrine is in accordance with the English practice. See 6 C. & P., 90.

But in *Sten*
which set up
the indictment
the ground th
dence on whi

And in *Con*
ment, it was
find an indict
an investigati

In *State v.*
found by the
sworn in cou

Distru

On the trial
evidence
ning of f
connecte
short tim
declared
removed
speaking
by his co
broken u
returnin

On such tri
was inad
and con
propriet
church i

On such tria
that he
and spr
what th

On such tria
tom in t
just bef
grievanc

It is not nec
tion, th
worship
bled for
of the d

But in *Stewart v. State*, 24 Ind., 142, on a plea in abatement to an indictment which set up that one of the grand jurors never heard the evidence on which the indictment was founded, the court *held* the plea properly overruled, on the ground that it was "not competent to inquire into the amount of evidence on which the grand jury acted."

And in *Com. v. Woods*, 10 Gray (Mass.), 477, on a motion to quash an indictment, it was *held* that a grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term.

In *State v. Guin*, 1 Hawks. (N. C.), 352, an indictment was quashed because found by the grand jury upon the testimony of some of their own body, not sworn in court as witnesses.

STATE v. RAMSAY.

(78 N. C., 448.)

DISTURBING A RELIGIOUS CONGREGATION: *Evidence — Charge.*

On the trial of an indictment for disturbing a religious congregation, it was in evidence that the defendant, either just before or shortly after the beginning of the services, rose up in the church and began to speak on matters connected with his expulsion from the church, which had occurred a short time previously; that the minister directed him to stop, when he declared he would be heard, and persisted in speaking until he was removed from the house; that he thereupon re-entered and resumed his speaking, notwithstanding repeated remonstrances from the minister, and by his conduct and voice so interrupted the services that the meeting was broken up: *Held*, that upon this evidence the jury were warranted in returning a verdict of guilty.

On such trial, evidence as to "before what body the defendant was tried" was inadmissible; also as to "how members of that church were tried and convicted;" also as to the manner of defendant's expulsion and its propriety; also as to whether the official board or the members of the church had, under its rules, authority to expel.

On such trial a witness introduced by the state testified, on cross-examination, that he had "taken the defendant to task for sowing the seeds of discord and spreading false views:" *Held*, to be inadmissible to further inquire what those false views were.

On such trial it was admissible for the state to ask a witness "if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service and make known his grievances?"

It is not necessary to constitute the offense of disturbing a religious congregation, that the congregation should be actually engaged in acts of religious worship at the time of the disturbance; it is sufficient if they are assembled for the purpose of worship and are prevented therefrom by the acts of the defendant.

Where, on such trial, the court charged, at the defendant's request, "that the act of disturbance must be wanton, intentional and contemptuous," but added "that the acts would be wanton if done without regard to consequences—that is, for some purpose of his own, and with intent to do them, whether he thereby disturbed the congregation or not." *Held*, not to be error: *State v. Jasper*, 4 Dev., 323; *State v. Swink*, 4 Dev. and Bat., 358; *State v. Fisher*, 3 Ire., 111; *State v. Linkhaw*, 69 N. C., 214, cited, distinguished and approved.

Indictment for disturbing a religious congregation, tried at May term, 1877, of Wake criminal court, before STRONG, J.

The case is sufficiently stated by the chief justice in delivering the opinion of this court. Verdict of guilty. Judgment. Appeal by defendant.

Mr. A. M. Lewis, who prosecuted in the court below, appeared with the attorney-general, for the state.

Mr. T. M. Argo, for the defendant.

SMITH, C. J. The defendant is charged with the offense of disturbing a religious congregation and obstructing public worship.

It was in evidence that a religious congregation, under the ministerial charge of one Edwin Marcom, was accustomed to assemble for divine worship at a place known as Piney Grove church; that on Sunday the 13th of May, 1876, the congregation began to assemble, and a number, estimated by witnesses at from ten to thirty, were in the church, and their minister in his place in the pulpit.

Some of the witnesses testified that services had already begun by the singing of a hymn; and others, that the congregation had been engaged in voluntary singing not under the direction of the minister, and that the regular hour for Sabbath services had not arrived.

The defendant, who had been a member of the church, and had been, about two weeks before, expelled from its communion, rose up in the church and began to speak on matters connected with his expulsion, when he was told by the minister that he could not be permitted to do so, and must stop; that the defendant declared he would be heard, and persisted in speaking to those present, until some of the members put him out of the house; that he re-entered immediately and resumed his speaking, in disregard of repeated commands and remonstrances from the minister, and by his disorderly conduct and noise so inter-

rupted the present left

Various of the court of which properly u

Excepti witness for member o turned on proposed defendant inquiry v

Excepti witness for for sowing defendant solicitor c

Excepti his own sentenced excluded

Excepti witnesses in refere and its was decl

Excepti custom i Sabbath vice, an objected answered

Excepti ness, hi of the c question

The whether expelled

rupted the exercises that the meeting was broken up, and those present left the house and returned home.

Various exceptions were taken by the defendant to the rulings of the court in admitting and rejecting evidence, only so much of which will be stated as is necessary to the exceptions being properly understood.

Exception 1. On the cross-examination of Edwin Marcom, a witness for the state, he stated that the defendant had been a member of his church, but was not then a member, having been turned out about two weeks before. The defendant's counsel proposed further to inquire of the witness, before what body the defendant had been tried. The solicitor objected, and the inquiry was not permitted.

Exception 2. On the cross-examination of Edwin Marcom, a witness for the state, he said he had taken the defendant to task for sowing the seeds of discord and spreading false views. The defendant's counsel asked what these false views were. The solicitor objected and the answer was disallowed.

Exception 3. The defendant's counsel inquired of one of his own witnesses how members of that church are tried and sentenced. On objection of the solicitor the evidence was excluded.

Exception 4. Defendant's counsel proposed to ask of his own witnesses about a conversation between Marcom and the witness, in reference to defendant's expulsion from church membership, and its propriety. On objection of the solicitor the evidence was declared inadmissible.

Exceptions 5 and 6. The solicitor asked a witness if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make known his grievances. This question was objected to by defendant's counsel, but allowed to be put and answered.

Exception 7. On the redirect examination of defendant's witness, his counsel inquired if "the official board of the members of the church had under its rules the authority to expel." The question, objected to by the solicitor, was ruled out.

The exception to the evidence elicited in answer to the inquiry whether any usage prevailed in the church which permits an expelled member, on the Sabbath day, at or just before the

regular services commenced, to discuss his grievances before the congregation, is without just foundation.

The evidence tended to show that the interruption was without pretext or excuse, and that the time and place selected by the defendant to make known his complaints were not only in themselves inopportune and improper, but found no countenance in the practices of the church.

We are of the opinion that these rulings of the court are correct and that the exceptions are untenable. The evidence offered by the defendant, and excluded, was altogether irrelevant and calculated to mislead. Whether the defendant was rightfully or wrongfully turned out of the church—whether because of irregularity in the proceedings, he was still a member of the body or had ceased to be—were matters foreign to the issue to be tried. Whenever a religious body is wantonly and intentionally disturbed and obstructed in its worship of Almighty God, it is a misdemeanor, by whomsoever done, and it is no defense that the party committing the act is a member of the congregation disturbed.

The court was right also in not allowing an examination into and a review of the church judiciary, to ascertain if it was regular and right. This is not a subject of inquiry before the court, and the examination was properly arrested.

We propose next to consider the matters of exception to the instructions given to the jury, as to what acts constitute the offense charged against the prisoner.

The court charged the jury, that if the congregation were assembled for religious worship, and five or more persons had met and were engaged in acts of devotion by singing and praying, shortly before the usual Sabbath exercises conducted by the minister began, and the defendant did the acts of disorder and interruption deposed to by the witness, for the purpose of disturbing the congregation, or if he did those acts without authority according to the custom of the congregation, with intent to make himself heard, regardless of the disturbance thereby made; or if he did the acts mentioned, to prevent the regular religious service for which the congregation was then assembling; or without the sanction of usage in the church with intent to make himself heard, though he might thereby disturb the congregation, and if he did thereby disturb the congregation, he would be guilty of the offense charged.

The defendant
stitute the
actually engaged
this instruction
the purpose
disturbance,

The defendant
the act of
temptuous."

The court
ton if done
pose of his
disturbed the

There can
charge were
declared), th
No one has
others, by m
so boisterous
meeting alt
was held; a
obvious and
is done inte
of the right
of rights o
enlightened

And we
the congreg
about to be
engaged, an
up the me
those whic
they begin
reason for
briefly to
which our
v. Jasper,
interrupt
ing in a
actions and

The defendant's counsel asked the court to charge that, to constitute the offense, the congregation must, when disturbed, be actually engaged in acts of religious worship. The court refused this instruction, but told the jury that if they were assembled for the purpose of worship and were prevented therefrom by the disturbance, it would be sufficient, as already charged.

The defendant's counsel asked this further instruction: "that the act of disturbance must be wanton, intentional and contemptuous."

The court so charged, but added "that the acts would be wanton if done without regard to consequences, that is, for some purpose of his own and with intent to do them, whether he thereby disturbed the congregation or not."

There can be no serious doubt, if the facts assumed in the charge were satisfactorily proved to the jury (and the verdict so declared), that the defendant has been guilty of a misdemeanor. No one has a right to interfere with the religious devotion of others, by making known his own grievances, real or fancied, in so boisterous a manner as to disturb and finally break up the meeting altogether, and thus frustrate the object for which it was held; and he cannot be heard to say he did not intend the obvious and necessary consequences of his conduct. If the act is done intentionally and without excuse, it is a wanton invasion of the rights and privileges guaranteed in § 26 of the declaration of rights of the constitution of the state, and sustained by an enlightened public sentiment.

And we think the protection of the law is extended as well to the congregation when assembled in their house of worship and about to begin the regular exercises, as when it is actually so engaged, and that acts which prevent those exercises and break up the meeting so that they cannot be had at all, equally with those which disturb the religious devotions of the assembly after they begin, are prohibited by law. We cannot see any just reason for distinguishing between the two cases. We refer briefly to the few adjudications on the subject in this state to which our attention has been called in the argument. In *State v. Jasper*, 4 Dev., 323, the court declares it a misdemeanor to interrupt and disturb a religious meeting "by talking and laughing in a loud voice," and "making ridiculous and indecent actions and grimaces, during the performance of divine service."

So the court declares it to be an indictable offense to disturb a congregation engaged in public worship, though it be not in a church, chapel or meeting-house especially set apart for the purpose: *State v. Swink*, 4 Dev. and Bat., 358. But it is not a misdemeanor if the disturbance takes place after the religious exercises are over and when the congregation has entered upon secular business: *State v. Fisher*, 3 Ire., 111. So, if the interruption arises from loud singing by one who is honestly participating in the service and intends no disrespect, it is not punishable by indictment: *State v. Linkhaw*, 69 N. C., 214.

The principle which underlies the adjudications in this state is obviously the right of every religious body to meet and engage in the worship of God, in the language of our constitution, "according to the dictates of their own consciences," and to be protected by law in the enjoyment of that right. It can make little difference whether the liberty of public worship is denied by conduct which breaks up and disperses a body, met for religious purposes and just about to enter upon its duties, or the congregation is *interrupted* only during its devotions, and not wholly prevented from performing them.

It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury were warranted in so finding, when they had the admitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened.

There is no error. Let this be certified.

PER CURIAM.

Judgment affirmed.

SHARLEY v. STATE.

(54 IND., 168.)

FORGERY: *Variance*.

THE indictment was for forging a promissory note which, as set forth in the indictment, contained these words: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest," etc. The note offered in evidence did not contain the words "and notice of protest." *Held* a fatal variance, and that the note was not admissible in evidence.

PERKINS,
The first

"The gra
Indiana, up
29th day of
six, at said
and counter
money, whi
wit:

"\$200.00

"Thirty
the order of
est at ten p
maturity at
cent attorne
Waterloo,
from valuat
ers severall
of protest a
ground of
given by th

"Due —

with intent
lan, who w
Bank, cont
provided,
Indiana."
as true a c
set forth, a
is predicat

A motio
tion noted
trial follow
ment a fin
in the st
of judgm
verdict.

On the

PERKINS, J. Indictment for forgery, consisting of two counts. The first is as follows, omitting the title of the cause, etc.:

"The grand jurors for the county of DeKalb, in the state of Indiana, upon their oaths present that David Sharley, on the 29th day of August, in the year eighteen hundred and seventy-six, at said county, unlawfully, feloniously and falsely did forge and counterfeit a certain promissory note for the payment of money, which said forged and counterfeit note is as follows, to wit:

"\$200.00

WATERLOO, Indiana, August 29th, 1876.

"Thirty days after date, we, or either of us, promise to pay to the order of the DeKalb Bank, two hundred dollars, with interest at ten per cent per annum after maturity, the interest until maturity at that rate having been paid in advance, and ten per cent attorney's fee, negotiable and payable at the DeKalb Bank, Waterloo, Indiana, value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, and all defenses on the ground of any extension of time of its payment, that may be given by the holder or holders to them or either of them.

"Due ——— No. ———

JOHN SHIRREY.

JOHN R. WALKER.

with intent to defraud James I. Best and Charles A. O. McClellan, who were doing business under the firm name of DeKalb Bank, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana." There was a second count for uttering and publishing as true a certain other false, forged, etc., note, a copy of which is set forth, and which is literally like that on which the first count is predicated.

A motion to quash the indictment was overruled, and exception noted. The defendant then pleaded the general denial; a trial followed; verdict against the defendant, fixing as his punishment a fine of twenty-five dollars and four years' imprisonment in the state prison. Motions for a new trial and in arrest of judgment were overruled, and judgment entered on the verdict.

On the trial, the state offered in evidence as the note alleged

and set forth by copy in both counts of the indictment to be the forged note, a note of which the following is a copy :

" \$200.00

WATERLOO, Indiana, August 29th, 1876.

" Thirty days after date, we, or either of us, promise to pay to the order of the DeKalb Bank, two hundred dollars, with interest at ten per cent per annum after maturity, the interest until maturity at that rate having been paid in advance, and ten per cent attorney's fees, negotiable and payable at the DeKalb Bank, Waterloo, Indiana, value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and non-payment of this note, and all defenses on the ground of any extension of the time of its payment, that may be given by the holder or holders to them or either of them.

" Due September 30. No. 648.

JOHN SHIRREY.

JOHN R. WALKER."

To the admission of the note in evidence, the defendant objected on the ground that it was incompetent, irrelevant, etc., but the court overruled the objection and allowed the note to go in evidence to the jury. Proper exception was taken, and alleged errors are properly assigned.

The court did not err in overruling the motion to quash the indictment, and its imperfections, if it had any, were not such as were fatal under sec. 61, p. 386, 2 R. S. 1876.

The court did err in admitting the note in evidence, because of a variance between it and the note set out in the indictment. In this case it was necessary that the instrument offered in evidence should correspond with that stated in the indictment. A mere literal variance, however, that is, where the omission or addition of a letter would not alter or change a word, so as to make it another word, would not be material: 1 Leach, 158; 1 Cowp., 229. Thus, the variance between Messes. and Messrs. would not be material: 2 Russ. Crimes, 9th ed., 800; Bicknell's Crim. Pr., 366. See *Porter v. The State*, 15 Ind., 433, and cases cited.

But the note offered in evidence, and admitted over defendant's objection, did not correspond with that stated in the indictment. There was more than a literal variance. There was a verbal variance inconsistent with the identity of the two instruments, in this: the note set forth in the indictment, in what we

will designa
indorsers sev
notice of pro

This claus
drawers and
protest and
words "and
stated in the
reversed.

Reversed,

An indictment
written in
ing thereb
Askew Br
individual
under sect

APPEAL f

Tried bef

The appe
charged tha
in writing, i
Brothers;"
said instrum
Samuel H.
lars and two

The defe
"First. Th
invalid on
effect a fra
That the in
against any
ficate, or o
instrument

will designate its waiver clause, reads thus: "The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note."

This clause of the note admitted in evidence reads thus: "The drawers and indorsers severally waive presentment for payment, protest and non-payment of this note." It does not contain the words "and notice of protest," which are contained in the note stated in the indictment. For this error the judgment must be reversed.

Reversed, and remanded for a new trial.

REMBERT v. THE STATE.

(53 Ala., 467.)

FORGERY: *Indictment.*

An indictment charging that defendant forged, with intent to defraud, a written instrument as follows: "Due 8.25. Askew Brothers." Meaning thereby that eight dollars and twenty-five cents were due to him from Askew Brothers, which was a partnership composed of certain specified individuals, is not demurrable, and charges forgery in the second degree, under section 3702 of the Revised Code.

APPEAL from circuit court of Marengo.

Tried before Hon. Luther R. Smith.

The appellant was tried and convicted on an indictment which charged that he, "with intent to defraud," forged an instrument in writing, in words and figures, as follows: "Due 8.25. Askew Brothers;" meaning thereby that there was due the bearer of said instrument, from said Askew Brothers, a firm composed of Samuel H. Askew and Warren S. Askew, the sum of eight dollars and twenty-five cents.

The defendant demurred to the indictment on the grounds: "*First.* That the instrument in writing, alleged to be forged, is invalid on its face, creates no liability, has no legal tendency to effect a fraud, and cannot be the subject of forgery. *Second.* That the instrument alleged to be forged creates no legal liability against any person whatever, and is not a bill, note, check, certificate, or other evidence of debt, and that the meaning of the instrument cannot be ascertained from the words and figures

thereof." The court overruled the demurrer, and its ruling is now relied on as error fatal to the conviction.

McCan & Bartlett. The instrument is not a writing of any validity at law. It creates no liability upon any one, and cannot be the subject of a forgery. An instrument must be *valid on its face* to be the subject of forgery: *State v. Smith*, 8 Yerger, 151; *Jones's Case*, Lord Mansfield, Sum. Assizes, 1779; *State v. Pierce*, 8 Iowa, 231; 37 Texas, 591.

John W. A. Sanford, attorney-general, with whom was *R. H. Clarke, contra.* An action could have been maintained against Askew Brothers on the instrument if valid, and hence it is the subject of forgery.

The indictment is good if any state of facts could have existed which would have supported it. The court, looking at the instrument without the aid of *innuendo* in the indictment and extrinsic proof, had the right to supply the word dollars: *Murrell v. Handy*, 17 Mo., 406; *Northrop v. Sanborn*, 22 Vt., 433; *Butler v. The State*, 22 Ala., 43.

BRICKELL, C. J. There are numerous definitions of the offense of forgery, not, perhaps, substantially differing. We adopt, as comprehensive and precise, that given by Mr. Bishop: "Forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability:" 2 Bish. Crim. Law, § 495. Mr. Bishop observes: "The principal point for consideration is, that the instrument must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; or, in other words, must be legally capable of effecting a fraud:" *Ib.*, § 503. If the writing has this capacity, it is not necessary the fraud should have been consummated; the offense is complete without the concurrence of damage or injury: *Jones v. State*, 50 Ala., 161.

If the writing is void on its face—illegal in its very frame—it has not the capacity of effecting a fraud, and is not the subject of forgery. An illustration given by Mr. East is Wall's case, who was convicted for forging and altering a will of land, purporting to be attested by only two, the statute of wills requiring the attestation of three witnesses. The judges held the conviction wrong, because the instrument on its face was void, incapable of working injury, and no extrinsic facts could impart to it validity: 2 East's Crown Law, 953. So in *People v. Galloway*, 17

Wend., 540, her own real not purporting the statute of forgery. That a slave fact certified not the office instrument v ger, 150. S of a cheat, i efficacy, eith facts, it was The false m constitute th Case, 2 East

This gene is not the su when the in or show that exist by wh defraud ano averring the defraud, wil fact that the without the it has the v indictment for forgery instrument, was the sub perfect, and void, is inte character, as void bill of the deed voi inal character is imperfect intelligible from extrins such facts,

Wend., 540, a deed of lands made by a *feme covert*, conveying her own real estate, the deed on its face disclosing the facts, and not purporting to be acknowledged in the mode prescribed by the statute to give it validity, was declared not the subject of forgery. The forgery of a certificate of a private individual, that a slave was a freeman, not, if genuine, being evidence of the fact certified, imposing no duty and conferring no right, was not the offense denounced. It was not the fabrication of an instrument which could affect property: *State v. Smith*, 8 Yerger, 150. Such an instrument might have been the ingredient of a cheat, if injury had ensued from it; but being of no legal efficacy, either apparent or which could arise from extrinsic facts, it was not sufficient to constitute the offense of forgery. The false making a bill of exchange, void by statute, will not constitute the offense: *State v. Jones*, 1 Bay, 205; *Moffatt's Case*, 2 East's Crown Law, 954.

This general rule, that if the instrument is void on its face, it is not the subject of forgery, must be taken with this limitation; when the instrument does not appear to have any legal validity, or show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete, and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported: *State v. Briggs*, 34 Vt., 503. The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts. In all indictments for forgery at common law, it was necessary to set out the instrument, so that it would judicially appear to the court that it was the subject of forgery. When the instrument is complete, perfect, and not void on its face, and when it is spoken of as void, is intended illegal in its very frame, or innocuous from its character, as in the case of the will not properly attested, or the void bill of exchange, or the certificate worthless as evidence, or the deed void because of the incapacity of the grantor, its criminal character was disclosed to the court. When the instrument is imperfect, incomplete, and its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, and its capacity to injure is dependent on such facts, then, when such facts are averred, and the instru-

ment, its meaning and purport, made intelligible to the court, it appears judicially, with as much certainty as if the extrinsic facts were on the face of the instrument, and that set out *in hæc verba*, whether it has the vicious capacity, and is the subject of forgery: *Carberry v. State*, 11 Ohio St., 411; *Commonwealth v. Ray*, 3 Gray, 448; *State v. Wheeler*, 19 Minn., 98 (S. C., 1 Green's Crim. R., 541); *People v. Shall*, 9 Cow., 778; *People v. Harrison*, 8 Barb., 560; *Reed v. State*, 28 Ind., 396; *Commonwealth v. Hinds*, 101 Mass., 211; *People v. Stearns*, 21 Wend., 413. In this last case the principle is thus stated: "The indictment must show the forgery of an instrument which, on being described, appears on its face naturally calculated to work some effect on property; or, if it be not complete for that purpose, some extrinsic matter must be shown, whereby the court may judicially see its tendency. As an instance of the latter, suppose a man has the custody of property, which he agrees to deliver on the owner sending him certain words under his hand, which have no respect to property, but which are a secret sign agreed upon between them, and known only to them. Such words would be the subject of forgery within the statute; but not being significant, and it not being conceivable how mischief would ensue from their use, the custody of the goods and the agreement in the words must be shown in the indictment. But suppose a letter by which the writer requests another to deliver "my purse of gold," or "my package of bank-bills to A B," are not the court capable of seeing at once how the forgery of such an instrument may work a fraud; and, hence, would not the usual allegation, that the letter was counterfeited, with the usual general averment, that the act was with the intent to defraud, be sufficient?" The true inquiry is, not whether the instrument on its face is uncertain, incomplete and unintelligible, but is it void; if genuine, without regard to extrinsic facts, would it be invalid? The uncertainty and incompleteness may be removed or cured by reference to extrinsic facts; and when these are averred and proved, the offense is punishable as forgery.

The want of a payee, and the want of an expression in words, or in figures, accompanied by the dollar mark, of the sum acknowledged to be due, are the defects which it is insisted render the instrument forged void. No statute declares such an instrument void, and it certainly offends no principle of the common law for the maker to acknowledge in that

form his ind
edgment is
expected to
and that it
on extrinsic
capacity, th
will author
and the de
averring in
can it be de
of the facts

Under o
ation, and
nor could t
plaint, be
court would
expressing
the instrum
Mo., 406; 1
Ala., 114;
Ala., 43. C
ments void
which, from
with certain
ment is the
doubt, if
defendant a
instrument,
would have
insisted now

If, on its
appear to h
the avermen
instrument
on its face.
iary demand
under the s

There w
ment, and

form his indebtedness either to the person to whom the acknowledgment is delivered or to some other person who may be expected to receive it. It is merely uncertain and incomplete, and that it has the vicious capacity to defraud depends wholly on extrinsic facts. If these are averred, and disclose this capacity, the indictment is sufficient, and proof of the facts will authorize conviction. Suppose the instrument genuine, and the defendant suing the makers, Askew Brothers, on it, averring in his complaint the facts averred in the indictment, can it be doubted the complaint would be sufficient, and proof of the facts entitle him to a recovery?

Under our statute the instrument would import a consideration, and its execution could only be denied by a sworn plea; nor could the ownership of the plaintiff, averred in the complaint, be put in issue otherwise than by a sworn plea. The court would, by intendment, supply the dollar mark omitted in expressing the sum acknowledged to be due, rather than treat the instrument as void for uncertainty: *Murrill v. Handy*, 17 Mo., 406; *Northrop v. Sanborn*, 22 Vt., 433; *Evans v. Steel*, 2 Ala., 114; *White v. Word*, 22 Ala., 442; *Butler v. State*, 22 Ala., 43. Courts are very reluctant to pronounce written instruments void for mere uncertainty. When words are omitted which, from the very nature of the instrument, can be supplied with certainty, the legal construction and operation of the instrument is the same as if they had been expressed. No one can doubt, if Askew Brothers had made and delivered to the defendant a genuine instrument, in the words and figures of the instrument, that the courts, *ut res magis valeat quam pereat*, would have supplied by intendment the defects which it is insisted now render the instrument void.

If, on its face, the instrument is so uncertain that it does not appear to be the subject of forgery, capable of working injury, the averments of the indictment were the defect, and place the instrument just where it would stand if these facts were expressed on its face. It would then be an instrument creating a pecuniary demand, and its false making forgery in the second degree, under the statute: R. C., § 3702.

There was no error in overruling the demurrer to the indictment, and the judgment must be affirmed.

GREGORY v. STATE.

(26 Ohio St., 510.)

FORGERY: *Evidence.*

WHERE A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note, by falsely representing that C was authorized by B so to do: *Held*, that A was guilty of forgery.

MOTION for the allowance of a writ of error to the court of common pleas of Franklin county.

The plaintiff in error was indicted and convicted, under section 22 of the crimes act, as amended by the act of March 24, 1865 (S. & S., 264), for uttering and publishing as true and genuine a certain false, forged and counterfeit promissory note, for the payment of \$300, knowing the same to be false, forged and counterfeited, with intent to defraud a certain person named in the indictment.

The note purported to have been made by Daniel Bevis, payable to the order of E. W. Phelps, four months after date, or sooner, if made out of the sale of E. W. Phelps' harvest and saw sharpener; was dated June 13, 1874, and indorsed E. W. Phelps.

On the trial, evidence was given tending to prove that, at the date of the note, negotiations were pending between the plaintiff in error and Daniel Bevis, who resides in Prospect township, Marion county, in this state, which resulted in Bevis agreeing to become agent for the sale of the machine above named, in certain townships of Marion and Union counties, to complete which a contract was to be signed in duplicate by Bevis; but, as he was unable to write his name, his daughter Rebecca Jane was called and directed to sign his name to the contract for him; that while Rebecca Jane was at the table to sign the contract for her father, Miles Gregory, a brother of the plaintiff in error, engaged Mr. Bevis in the inspection of, and conversation about, some pictures that were hanging on the wall at the side of the room opposite that at which the writing was being done, and after she had signed the contract, the plaintiff in error produced the note set out in the indictment and requested her to sign her father's name to it, saying that it was "a little agreement between her father and himself;" that she signed it, as requested by the plaintiff in error, without further inquiry; and that the name of Daniel Bevis

was signed
knowledge

After the
among the
is admitted
Miss Bevis,
his name, a
reasonable
regard to th
tion in han
of the page
stood by hi
a promissor
that Bevis
called on to
and agreed
extent, she
name to th
shall furthe
consent of
cured her t
evidence, sh
was the act
a forgery, a
which the p

After ve
trial, which
after sente
tions, emb
which was
record.

The reas
on the tran

Pond c
claimed th
S. & S., 26
promissory
amended 7
Bishop on
section 14
State, 1 Y

was signed to the note by his daughter without his authority, knowledge or consent.

After the close of the argument, the court charged the jury, among the other instructions given, as follows: "In this case it is admitted that the name of Bevis was written on the note by Miss Bevis, the daughter of Bevis (Bevis not being able to write his name, as he testifies). Now, if you are satisfied beyond a reasonable doubt that Bevis and the defendant had agreed in regard to the papers Bevis was to sign to complete the negotiation in hand between them—that a promissory note was not one of the papers Bevis had agreed to sign, that it was not understood by him that he was to sign, and he did not intend to sign, a promissory note, all of which was known to the defendant; that Bevis being unable to write his name, his daughter was called on to act for him in signing such papers as he understood and agreed he would sign—then, and in such case, and to that extent, she was the agent of Bevis, and when she had written his name to those papers her agency for him ceased. And if you shall further find that the defendant, without the knowledge and consent of Bevis, and with intent to defraud, directed and procured her to sign the name of Bevis to the promissory note in evidence, she acted in that respect for the defendant. In law, it was the act of the defendant, and the signature so procured was a forgery, and the note was a false and forged instrument." To which the plaintiff in error excepted.

After verdict, a motion was made to set it aside and for a new trial, which was overruled by the court and excepted to; and, after sentence, the plaintiff in error presented his bill of exceptions, embodying the evidence, rulings, and charge of the court, which was signed and sealed by the court and made part of the record.

The reasons for this motion appear in the assignment of error on the transcript of the record on file in this case.

Pond & Jones and *Geo. K. Nash*, for plaintiff in error, claimed this was not a case of forgery (S. & C., 409, as amended S. & S., 264), but the procuring the signature of a person to a promissory note by a false pretense or pretenses (S. & C., 429, as amended 70 Ohio L., 39). See 3 Chitty's Crim. Law, 1006; 2 Bishop on Crim. Law, sections 472, 473; Wharton's Crim. Law, section 1441; *Putnam v. Sullivan*, 4 Mass., 53; *Hill v. The State*, 1 Yerg., 76; *Wright v. People*, 1 Breese, 66; *Reg. v.*

Collins, 2 Moody and Rob., 46; *Ib.*, 54; 2 Bishop Crim. Law, section 590; *Ib.*, section 584; 22 Penn. St., 394.

That Rebecca did not act as the agent of Gregory, but as the agent of her father, Bevis, and was induced to do so by the false representations of Gregory: 3 Chitty's Crim. Law, 1006; 2 Bishop on Crim. Law, sections 472, 473.

John Little, attorney-general, and *J. H. Outhwaite*, prosecuting attorney, for the state:

Rebecca was not the agent of her father in signing the note (1 Parsons on Contracts, 39, 40, 44), but the agent of Gregory; and the signing was the signing of the principal, Gregory, and was forgery: 2 Car. and Kir., 528; Wharton's Crim. Law, section 1419; 2 Car. and Kir., 201.

REX, J. Numerous errors are assigned on the record; but the errors relied on by counsel for the plaintiff in error in argument are:

"1. That the court erred in overruling the motion of the defendant to take the testimony of Daniel and Rebecca Jane Bevis from the jury.

"2. That the court erred in its charge to the jury.

"3. That the verdict was against the weight of the evidence in the case."

The first and second propositions present for decision the same question, viz.: Whether the procuring by the plaintiff in error of the signature of Daniel Bevis to the promissory note set out in the indictment, in the manner shown by the evidence, was a forgery by him.

The reasons urged by counsel in support of the motion of the plaintiff in error to withdraw the testimony of Bevis and his daughter from the jury are: That as the daughter was acting as the agent of her father in signing his name to the contract, she continued to act in the same capacity in signing his name to the promissory note, although she was not authorized so to do by her father, and was induced thereto by the false pretenses and representations of the plaintiff in error; and, therefore, that the plaintiff, if guilty of any crime, is guilty of procuring, by false pretenses, the signature of Daniel Bevis to the promissory note, as the maker thereof, which is also made punishable by statute; and the same reasons are urged in support of their second claim, "that the court erred in its charge to the jury."

We do not see how the acts of the daughter of the author of the note, father's name, her authority, of the plaintiff, ity as such.

In this case, extended to, and no further, her agency, to show that, and that such representation, ing at the time.

In signing the note, was therefore, hence her forgery:

We are, overruling the testimony charge to the jury.

The evidence fully sustained.

WELCH, J. concurred.

FORGERY: F.

The false name, form of the bearer, of the note, gery, and At the left up would au

We do not think that these reasons are well founded. The acts of the agent, to bind the principal, must be within the scope of the authority given to the agent, and if the signing of her father's name to the promissory note was not within the scope of her authority as his agent, the false pretenses and representations of the plaintiff in error could not and did not extend her authority as such agent.

In this case the agency of the daughter for her father extended to the signing of his name to the contract in duplicate, and no further. When, therefore, these two papers were signed, her agency for her father ceased. The evidence in the case tends to show that this was the extent of her authority as such agent, and that she was induced to sign the promissory note by the representations of the plaintiff in error, and at his request, believing at the time that the representations were true.

In signing her father's name to the promissory note, Rebecca was therefore the innocent agent of the plaintiff in error, and hence her act was the act of the plaintiff in error, and was a forgery: *Reginald v. Clifford*, 2 Carr. and Kir., 202.

We are, therefore, of opinion that the court did not err in overruling the motion of the plaintiff in error to withdraw the testimony of the witnesses named from the jury, nor in its charge to the jury.

The evidence set out in the bill of exceptions, in our opinion, fully sustains the verdict.

Motion overruled.

WELCH, C. J., WHITE, GILMORE, and McILVAINE, JJ., concurred.

STATE v. COYLE.

(41 Wis., 267.)

FORGERY: *Instrument valid on its face — Bank-check for "current funds."*

The false making, with fraudulent intent, of an instrument in the general form of a bank-check, requesting the bank to "pay W. T. C., Jr., or bearer, one fifty dollars in current funds," constitutes the crime of forgery, under sec. 1, ch. 166, R. S.

At the left upper corner of the check were the figures \$150.00. Whether this would authorize the court to supply the words "hundred and" between

"one" and "fifty" in the body of the instrument, *quere*; but the check at least calls for the payment of fifty dollars.

The check is apparently a valid obligation; would create a liability if genuine, and therefore had a tendency to defraud.

REPORTED from the circuit court for Brown county.

This was a criminal information. Its character and the proceedings had at the trial in the circuit court are sufficiently described in the following paragraphs from the opinion of Mr. Justice Cole, as originally prepared:

"The information charged the defendant with feloniously uttering and publishing as true a false and forged bill of exchange for the payment of money, of the form commonly known as a bank-check, with intent to injure and defraud Fred Hurlburt and Dell Charles, the defendant, knowing the bill of exchange to be false and forged. The information set out the instrument *in hæc verba*, as follows:

"HENRY STRONG, }	\$150.00.	{ GREEN BAY, WIS,
President. }		{ April 8, 1876.

"*First National Bank,*

"Pay W. T. Coyle, Jr., or bearer, one fifty dollars in current funds. No. 137.

[STAMP.]

"M. D. PEAK, *Cashier.*

"FRED HURLBURT.

"The defendant was convicted, and a motion in arrest was made, based on the following grounds: (1) The check set out in the information is not a bill of exchange, not being for the payment of money. (2) The check does not direct the payment of any particular amount of money, nor of any money whatever. (3) The check, as drawn, could not deceive any one, nor could any action be sustained on the check without first reforming it. After argument of counsel the circuit court, deeming the questions involved so important and doubtful as to require the decision of this court—the defendant desiring and consenting thereto—reported the case under sec. 8, ch. 180, R. S."

The cause was submitted on the briefs of the *Attorney-General* and *J. C. Neville*, district attorney of Brown county, for the state, and a brief of *Priest & Carter*, for the defendant.

For the d
evidence wa
Bish. Cr. L
an order for
for the pay
would lie t
exceptions
were also a

For the s
1. The inst
was for pr
resembled
"hundred"
The figures
removed al
\$150. It ca
to wit: one
lars, reject
note. The
upon it. 2
and falsely,
instrument
eacy, or the
19 Iowa, 2
Id., 365; *C*
Ayer, 3 C
217; 2 Pi
a forged i
intention t
enough if
word or ac
The essen
tion to def
have been
People v.
the manne
tion of th
would not
Cash., 481
any partic
Id., 805, n

For the defense it was insisted that the instrument offered in evidence was not finished and complete as a bill of exchange (2 Bish. Cr. L., § 562); that it was not payable in money, but was an order for a chattel, not naming it; that at least it did not call for the payment of any particular sum of money, and no action would lie upon it, nor was it calculated to deceive. Various exceptions to the rulings of the court, in regard to evidence, were also argued.

For the state it was argued, among other things, as follows:

1. The instrument declared on, if not for the payment of money, was for property, either being within our statute. In form it resembled a check, and was calculated to deceive. The word "hundred" will be supplied in the body of the instrument. The figures 150.00, preceded by the dollar mark, in the margin, removed all doubt, and showed that it was intended to be for \$150. It called for the payment of a particular amount of money, to wit: one hundred and fifty dollars; if not that, then fifty dollars, rejecting the "one" as surplusage: Arch. Cr. Pr., 864, note. The check was valid, and an action could be sustained upon it.
2. Forgery is the signing by one, without authority, and falsely, with intent to defraud, of the name of another to an instrument which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability: *State v. Thompson*, 19 Iowa, 299; *State v. Kimball*, 50 Me., 409; *Ames's Case*, 2 Id., 365; *Com. v. Chandler*, Thatcher's Cr. Cas., 187; *Com. v. Ayer*, 3 Cush., 150; *People v. Krummer*, 4 Parker's Cr. Cas., 217; 2 Pin., 332; 2 Bay (S. C.), 262; 8 Yerg., 151. Uttering a forged instrument is a declaration that it is good, with an intention to pass or offer to pass it: Whart. Cr. L., 1445. It is enough if it be offered as genuine, or declared or asserted by word or action to be good: *People v. Caton*, 25 Mich., 358. The essence of the crime consists in doing the act with the *intention to defraud*; and it is not necessary that any person should have been in fact defrauded: *State v. Pierce*, 8 Iowa, 231; *People v. Caton*, *supra*. And it makes no difference that from the manner of executing the forgery, or from the ordinary caution of the person who was to be defrauded, the instrument would not be likely to impose on him: *Com. v. Stephenson*, 11 Cush., 481. Nor is it necessary to show an intent to defraud any particular person: 2 Arch. Cr. Pr., 842, note; *Olier Case*, Id., 805, note; *Dunn Case*, Id., 831, and note. The law, how-

ever, presumes an intent to defraud the person who would have to pay the instrument: 2 Arch. Cr. Pr., 844; *Com. v. Stephenson, supra*. Uttering a forged order under a false representation is evidence of the *scienter*: *Sheppard's Case*, Leach's Crown Cas., 265. 3. National bank-notes are money: U. S. R. S., §§ 5172, 5182-3; Story on Bills, 53; 23 Wend., 372. As to current funds, see 8 Barb., 561.

COLE, J. A number of exceptions were taken during the trial to the rulings of the court admitting or excluding evidence, and these exceptions have been argued by counsel on both sides. We suppose, however, that our consideration must be confined to the questions involved in the motion in arrest of judgment, as those are the only ones the circuit court has reported for our decision. And those questions, it will be seen, relate principally to the sufficiency of the information. The information is framed upon sec. 1, ch. 166, R. S. By that section, the false making, alteration, forging, or counterfeiting of any bill of exchange, or order for money or other property, with a fraudulent intent, constitutes forgery.

The instrument set out in the information, on its face, is an order directed to a bank to pay the bearer a sum of money in current funds. This is the plain, natural meaning of the instrument. It is said that the check was not payable in money, but was an order for a chattel, without naming it. We do not think this would be the understanding or construction of such an instrument addressed to a bank whose business was receiving and paying out money. See *Elliott's Case*, 1 Leach's Crown Cas., 175; *The State v. Dourden*, 2 Dev., 443; *Evans v. The State*, 8 Ohio St., 196; *Carberry v. The State*, 11 Id., 410. The check is for the payment of money, or the payment of current funds which pass as money between banks, or between a bank and its customers. The words "personal property," as used in the statute, "include money, goods, chattels, things in action and evidences of debt." Subd. 14, sec. 3, ch. 5, R. S. If the order was for the payment or delivery of things in action or evidences of debt, it would come within the statute. But a person receiving the order would naturally expect, and would have the right to assume, that it was payable in money, or in bank-bills which pass for money. The order or check certainly, on its face, professes to be drawn by one who has funds in the bank which he

can control.
the false ma
tutes the cri

It is said
particular s
certainly ca
general argu
the body of
the \$ mark,
of that wor
this position
is complete
for the pay
as surplusag

A still f
not deceive
This object
already said
if genuine,
bank for t
wealth v. T
person may
the counter
the drawer
which it is
a valid obli

The case
answers to
that court

By the c

FORGERY :

A FORGED
Mr. Sch
his pay
Held, T

can control. Under the circumstances, we have no doubt that the false making of such an order, with fraudulent intent, constitutes the crime of forgery under the statute.

It is said that the order does not direct the payment of any particular sum of money, but is indefinite and incomplete. It certainly calls for the payment of fifty dollars. The attorney-general argues that the word "hundred" should be supplied in the body of the instrument; that the figures 150.00, preceded by the \$ mark, in the margin, authorize and warrant the insertion of that word. We have some doubt about the correctness of this position; but it is unnecessary to dwell upon it, as the crime is complete as the order now stands. At least the check calls for the payment of fifty dollars, the word "one" being rejected as surplusage.

A still further objection is, that the check, as drawn, would not deceive any one, nor could an action be sustained upon it. This objection has been sufficiently answered by what has been already said on the other points. It seems to us that the check, if genuine, would create a liability. For it is an order upon the bank for the payment of fifty dollars, at least. In *Commonwealth v. White and another*, 11 Cush., 481, it is held that "a person may be convicted of forging a check on a bank, although the counterfeit does not so much resemble the genuine check of the drawer as to be likely to deceive the officers of the bank on which it is drawn." It seems to us that this check was apparently a valid obligation, and had a tendency to defraud.

The case must be certified to the circuit court, with these answers to the questions reported, and with the direction that that court proceed in accordance with our decision.

By the COURT. It is so ordered.

CHIDESTER v. STATE.

(25 Ohio St., 483.)

FORGERY: *Order for delivery of goods and chattels — Evidence — Erroneous charge.*

A FORGED instrument was in the following terms: "AKRON, May 2, 1874.

Mr. Schroeder: Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for. J. BUTLER,"

Held, That such instrument may be described in an indictment as an

"order for the delivery of goods and chattels" within the meaning of the statute.

The word "value" in section 93 of the code of criminal procedure, is used in that section in the sense of "effect," "import," and not in the sense of "worth in money."

On the trial of a defendant, charged in an indictment with having forged such instrument, where evidence has been given tending to show that the defendant was not present when the forged instrument was made, it is error for the court to refuse to instruct the jury that if it be found by them that the defendant was not so present, he cannot be convicted of the offense charged in the indictment, or to instruct the jury that if it be found that the forged instrument was made by another person, by the procurement of the defendant, although he was not present at the forgery, he might be convicted of the offense charged in the indictment.

Error to the court of common pleas of Summit county.

At the October term, 1874, the plaintiff in error was indicted for forgery.

The indictment, which contained but one count, charged him with having feloniously, unlawfully and falsely made, forged and counterfeited a certain order for the delivery of goods and chattels, "which said false, forged and counterfeited order is lost; which said false, forged and counterfeited order is of the purpose, effect and value following, to wit:

"AKRON, May 2, 1874.

"MR. SCHROEDER: Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for.

"J. BUTLER.

with intent then and there and thereby to unlawfully defraud, contrary," etc.

A motion to quash the indictment, and a demurrer to it, were successively filed and overruled, and upon arraignment, the plaintiff in error pleaded in bar a former acquittal, which, on demurrer, was held to be insufficient; whereupon, for a further plea to the indictment, the plaintiff in error pleaded "not guilty."

The issue thus made was, at the same term, tried to a jury, who returned into court a verdict finding the plaintiff in error guilty, as charged in the indictment.

A motion was then filed asking the court to set aside the verdict and grant the plaintiff in error a new trial, for reasons founded principally on alleged errors of the court; in the admission of testimony; in refusing to instruct the jury as requested;

and in the
by the court
ground of t
was also o
sentenced to
costs of pro

The rever
N. D. T

I. The i
for the deliv
statute: S.

For what
Cr. Law, 34
420. It mu
est in or cor
not the case

II. The
ment, as req
301). The
sense and fe
larceny (S.
Ohio L., 34

III. If o
only be cor
indictments
contradictio
nizes the di
abettor.

J. M. P

I. The
the meanin
v. State, 8

II. Sect
of the inst
There is no
to the term
value is of
mined. T
accused gu

III. It
mitted thro

and in the instructions given to the jury, which was overruled by the court; whereupon a motion in arrest of judgment, on the ground of the insufficiency of the indictment, was filed, which was also overruled by the court and the plaintiff in error sentenced to imprisonment in the penitentiary and to pay the costs of prosecution.

The reversal of the judgment is the object of this proceeding. *N. D. Tibbals*, for plaintiff in error:

I. The instrument set out in the indictment is not an order for the delivery of goods and chattels within the meaning of the statute: S. & S., 264, section 22.

For what is an order, see *Bouvier's Law Dic.*, 262; *Whart. Cr. Law*, 349; 11 Ohio St., 410; 17 Ohio St., 142; 18 Ohio St., 420. It must purport to be drawn by some one having an interest in or control over the subject matter of the order. Such is not the case here.

II. The indictment does not set forth the value of the instrument, as required by section 93 of the criminal code (66 Ohio S., 301). The term "value" was used in this statute in the same sense and for the same purpose as in the act relating to grand larceny (S. & S., 263), and the act relating to petit larceny (66 Ohio L., 341).

III. If one procure another to falsely forge, the procurer can only be convicted of procuring, or aiding, or uttering, upon indictments therefor. To say that the procurer falsely made, is a contradiction of terms. Section 36, S. & C., 416, clearly recognizes the distinction between the maker and procurer, aider and abettor.

J. M. Poulson, for the state:

I. The instrument alleged to be a forgery was an order within the meaning of the act (S. & S., 264) relating to forgery: *Evans v. State*, 8 Ohio St., 196.

II. Section 93 of the criminal code does not require the value of the instrument to be alleged, nor does the common law. There is no analogy in the use of the term value in this statute to the term as used in the acts relating to larceny. In larceny value is of the essence of the offense, that its grade may be determined. The question in the case under consideration is, was the accused guilty of an intent to defraud any one of *any* value.

III. It is well established in Ohio that felony may be committed through the instrumentality of an agent: *Breese v. The*

State, 12 Ohio St., 146; *Warden v. The State*, 24 Ohio St., 143. Nor is the rule at all recent as applied to the law of forgery: Wharton's Am. Crim. Law, 4th ed., sec. 1419; 2 Archb. Crim. Pr. and Pl., 7th ed., 1860, 841.

H. C. Sanford, also for the state.

REX, J. The errors assigned upon the record, as grounds for the reversal of the judgment, present two questions for the determination of this court.

1. Does the indictment charge the plaintiff in error with the commission of an offense against the provisions of section 22 of the crimes act, as amended by the act of March 24, 1865 (S. & S., 264)?

The section of the statute under which the indictment was found, among other offenses therein described, makes it an offense for any person to falsely make, forge, counterfeit, etc., any order, warrant or request for the delivery of goods and chattels, with intent to damage or defraud any person or persons, and it is claimed by the plaintiff in error that the instrument set out in the indictment is not an order for the delivery of goods and chattels within the meaning of this statute, in support of which claim he cites 2 Bouv. L. Dic., 262; *Carberry v. The State*, 11 Ohio St., 410; *Bynam v. The State*, 17 Ohio St., 142; *Smith v. The State*, 18 Ohio St., 420.

It is true that the instrument set out in the indictment in this case does not direct the person to whom it is addressed to deliver goods of the drawer to the person named in the order; but it directs the drawee to deliver certain goods, which were then the property of the drawee, to the person named in the order, on the credit of the drawer, and if the order had been genuine, would have created a liability on the part of Butler, to account to Schroeder for the value of the goods delivered by him to the plaintiff in error. Indeed, nothing appears in the order from which an inference can be drawn that the relations subsisting between the drawer and Schroeder were not such that the drawer, had the instrument been genuine, had a right to expect and require the compliance of Schroeder with the direction, and hence we are of opinion that the instrument set out in the indictment, is an order for the delivery of goods and chattels within the meaning of the statute.

In this case the testimony set out in the bill of exceptions

establishes th
in fact, accor
goods describ
in its genuin
the plaintiff i

The cases c
are not in cor

In *Carberry*
ment which d
smallest, with
order for the
consequently
the forgery o
give it a char
sufficient to s

In *Bynam*
which charge
the payment
pay Binam
writing on i
extrinsic fac
money; and
says: "No d
& Co.," and
writing of i
natural or a
case was, tha
avermment to
meant. The
that case it v
the meaning

It is furth
is defective
the forged i
make the va
tion or an in
neither is th
section 167
value of the
indictment
93 of the co

establishes the fact that the object intended to be, and which was in fact, accomplished by the instrument, was the delivery of the goods described in it to the plaintiff in error, on Schroeder's faith in its genuineness, Schroeder having knowledge of the fact that the plaintiff in error was, at the time, in the employ of Butler.

The cases cited by the plaintiff in error in support of his claim are not in conflict with the conclusion arrived at in this case.

In *Carberry v. The State*, the court held that a forged instrument which directed the drawee to "let the bearer have one of your smallest, with load, to charge to" the drawer, was not, *per se*, an order for the delivery of a pistol or other goods of any kind, and consequently that an indictment which charged a defendant with the forgery of such an instrument, without proper innuendoes to give it a character and meaning not apparent on its face, was not sufficient to sustain a conviction upon it.

In *Bynam v. The State*, the court held that an indictment which charged the plaintiff in error with forging an order for the payment of money, of the following tenor: "M. C. & Co., pay Binam \$5.75, J. L. C.," was bad, on the ground that the writing on its face, unaided by innuendo or the statement of extrinsic facts, did not import an order for the payment of money; and in delivering the opinion of the court, White, J., says: "No definite meaning can be ascribed to the letters 'M. C. & Co.,' and 'J. L. C.' They are of themselves arbitrary. The writing of itself does not purport to be by or on any person, natural or artificial." So that the actual point decided in the case was, that the indictment was bad because it contained no averment to show what the letters "M. C. & Co." and "J. L. C." meant. The case of *Smith v. The State*, is not in point. In that case it was held that a tax duplicate was not a record within the meaning of section 22 of the crimes act.

It is further urged by the plaintiff in error that the indictment is defective in this, that it does not aver or set forth the value of the forged instrument. The statute creating the offense does not make the value of the forged instrument a part of the description or an ingredient of the offense for any purpose whatever, neither is the crime of forgery included in the crimes named in section 167 of the code of criminal procedure, and hence the value of the forged instrument is not a necessary averment in an indictment for that crime. The word "value," as used in section 93 of the code of criminal procedure, which provides, "That in

an indictment for falsely making, altering, forging, printing, photographing, uttering, disposing of, or putting off any instrument, it shall be sufficient to set forth the purport and value thereof," is not used in the sense of the "worth of the instrument in money," but in the sense "of the effect the instrument is intended to accomplish," and hence as the synonym of "effect" or "import."

2. Did the court err in refusing to instruct the jury as requested by the plaintiff in error, and in the instructions as given?

It appears from the bill of exceptions that, on the trial, the plaintiff in error, to maintain the issue on his part, gave evidence tending to show that the instrument set out in the indictment was written by a person named Smail; that he, the plaintiff in error, was not present when it was written, and that he used it, knowing that the signature of Butler thereto was not genuine, for the purpose of obtaining from Schroeder the clothes he had previously ordered and agreed to pay for on delivery; and there being no evidence on the part of the state tending to show who did write the order, the plaintiff in error requested the court to instruct the jury as follows:

"If the jury find that the defendant did not, in fact, write or sign the instrument described in the indictment, although he presented and delivered it to Schroeder, knowing its falsity, and obtained the clothes on it, yet he cannot be convicted of falsely forging it, under the charge in the indictment." Which instruction the court refused to give without the following modification: "But if you find that the defendant procured another to write it for him, he would be just as guilty and would be guilty of forging it; for the rule 'that what one does by another he does himself,' is applicable in such a case."

The plaintiff in error also requested the court to instruct the jury: "Although the defendant may be guilty of knowingly uttering and publishing the instrument, yet since he is not charged with that, but of falsely forging it, he can only be convicted upon the charge in the indictment; and if you find that he did not in fact make and forge it, he must be acquitted." Which was by the court "allowed as the law, but subject to the same qualification as above, in the event he did it by another instead of himself."

We are
the jury as

The plain
made out i
their consi
dence, nec
have been

The test
did not co
committed
could not
been legal
if it had b
be commit
that he wa

Section
& S., 266,
act to be
state, mad
penitential
as the pri
curer of a
offense ag

The ju
remanded

McILV.
curred.

On the tri
to pro
eviden
living

WADE
ment an
overrulin

We are of opinion that the court erred in refusing to instruct the jury as requested, and in the instructions given.

The plaintiff in error had the right to have the whole case, as made out in the evidence on the trial, submitted to the jury for their consideration. The instructions asked were, under the evidence, necessary to the proper submission of the case, and should have been given, substantially as requested.

The testimony of the plaintiff in error tended to show that he did not commit the forgery, and was not present when it was committed. If this had been found to be true by the jury, he could not have been found guilty of forgery; nor could he have been legally convicted of the offense charged in the indictment, if it had been found by the jury that he procured the forgery to be committed by another, unless it had also been found by them that he was actually present at its commission.

Section 36 of the crimes act, as amended March 24, 1864, S. & S., 266, makes it a separate and distinct offense to procure any act to be done, or committed, which is, by any statute of this state, made punishable with death, or by imprisonment in the penitentiary, and subjects the procurer to the same punishment as the principal offender; and hence to convict a person as procurer of a felony, he must be charged in the indictment with an offense against the provisions of this section of the statute.

The judgment must, therefore, be reversed, and the cause remanded for a new trial.

Judgment accordingly.

McILVAINE, C. J., WELCH, WHITE, and GILMORE, JJ., concurred.

TERRITORY v. WHITCOMB.

(1 Montana, 359.)

FORNICATION: *Evidence.*

On the trial of an indictment for fornication, it devolves upon the prosecution to prove that the respondents are unmarried. In the absence of any evidence on the subject, the law presumes that a man and woman openly living and cohabiting together are lawfully married.

WADE, C. J. This case is here upon appeal from the judgment and verdict in the court below, and from the order overruling a motion for a new trial.

This is an indictment for fornication, drawn upon the one hundred and twenty-seventh section of the "act concerning crimes and punishments," statutes 1865, p. 209, wherein it is alleged that on the 20th day of January, 1869, at the county of Lewis and Clarke, the defendants Edward Whitcomb and Catherine Durgen, did then and there unlawfully live together in an open state of fornication, the said Whitcomb being then and there a single and unmarried man, and the said Durgen being then and there a single and unmarried woman.

This was the separate trial of the defendant Whitcomb. Among the errors complained of, as shown by the record, are the following:

1. The refusal of the court to give the following instructions to the jury, asked for on behalf of the defendant: "The jury are instructed that it devolves upon the prosecution to prove every material allegation necessary to constitute the crime charged; that it is a material point to prove, that the parties charged were not intermarried, and that, in the absence of any testimony upon that point, the jury cannot presume that the defendants were associating unlawfully."

2. The giving of the following instructions to the jury, asked for by the prosecution: "That it devolves upon the prosecution to prove every material allegation necessary to constitute the crime charged; that it is a material point, that the jury should believe that the parties charged were not intermarried, and, if there is a reasonable doubt upon that point, the jury cannot presume that the defendants were associating unlawfully, in case there is evidence sufficient to raise a reasonable doubt in the mind of the jury upon that point."

It was necessary to aver in the indictment, and to prove upon the trial, that the defendant was single and unmarried; for the meaning of the term "fornication" is the carnal and illicit intercourse of an unmarried person with the opposite sex. It is impossible for a married man and a married woman to commit fornication. Unlawful sexual intercourse, and open and unlawful living together of a married man and married woman, or where either are married, and thus have intercourse or live together, is adultery; and the same state of facts existing between unmarried persons, man and woman, is fornication.

We have carefully examined the record of evidence and testimony in this case, and we find that, upon the trial of this case,

there was to show, the crime is a

If they it would have been so liable in the absence of a conviction for the crime of the defendant on the trial, and a conviction

The for the prosecution it authorized unmarried edge and

It is an no belief, before the guardian must believe in open court that the juryman beyond reach

The jury granted.

FORNICATION

It is not in greater races than Vol.

there was no testimony offered or received, showing, or tending to show, that these defendants were not married at the time the crime is alleged to have been committed.

If they were living together in an open and notorious manner, it would be but a reasonable presumption to presume that they were so living lawfully and as they had a right to do, and, in the absence of any proof to show that they were unmarried, a conviction for fornication ought to be impossible. Even the married condition of either of the parties would change the nature of the crime, so that the married or unmarried condition of these defendants, or either of them, was a most material inquiry upon the trial, and the absence of any proof upon the subject renders a conviction legally impossible.

The foregoing instruction asked for and given on behalf of the prosecution, is inherently wrong. It will be observed, that it authorizes the jury to form an opinion as to the married or unmarried condition of the defendants, from their own knowledge and belief, in the absence of any testimony on the subject.

It is an old and familiar doctrine that juries must have or form no belief, except what they believe from the testimony produced before them at the trial. Any other rule would destroy this guardian of our right and liberties—the trial by jury. The jury must believe from the testimony, legally produced before them in open court, and from that alone, and any instruction of the court that permits the private belief or private knowledge of a jurymen to sway his findings or his judgment, is wrong and beyond remedy.

The judgment of the court below is set aside, and a new trial granted.

Exceptions sustained.

FORD v. STATE.

(53 Ala., 150.)

FORNICATION: *Aggravation of offense when committed by a negro and a white person—Constitutional law.*

It is not in violation of the constitution of the United States to punish with greater severity fornication and adultery between persons of different races than between persons of the same race.

VOL. II.—11

THE appellants, a white man and a negro woman, were indicted for living together in adultery or fornication.

The indictment was demurred to, on the ground that it charged no offense, and that the section of the Revised Code upon which it was based violated the constitution of the state and of the United States.

The demurrer having been overruled, a trial was had on a plea of not guilty. The jury having found the defendants guilty, they moved in arrest of judgment on the ground of the unconstitutionality of the statute on which the indictment was founded; but the court overruled the motion, and passed sentence on the verdict, and hence this appeal.

John A. Foster, for appellants. The legislature had no power to make an act which, when committed by persons of the same race, is only a misdemeanor, a felony when committed by persons of different races. Such a law is violative of the constitution of the United States and of the state of Alabama: *Burns v. State*, 48 Ala., 195.

John W. A. Sandford, attorney-general, *contra*. Every state has the right to regulate its domestic affairs, and to adopt a domestic policy most conducive to the interest and welfare of its people: *Slaughter House Cases*, 16 Wall., 36-78.

Section 3602 of the Revised Code conflicts with no provision of the state or federal constitution, and is repugnant to no act of congress. The case of *Burns v. State*, 48 Ala., should be overruled: *Ellis & Thornton v. State*, 42 Ala., 525; *Gibson v. State*, 36 Ind., 389.

PER CURIAM. On the question involved in this case, we can add nothing to the thorough discussion it received in *Ellis v. State*, 42 Ala., 525. We do not see that there is any conflict between the decision in that case and the decision in *Burns v. State*, 48 Ala., 195. The latter case involved only the validity of the statute prohibiting marriage between whites and blacks. The validity of the statute prohibiting such persons from living in adultery was not involved. Marriage may be a natural and civil right, pertaining to all persons. Living in adultery is offensive to all laws, human and divine, and human laws must impose punishments adequate to the enormity of the offense and its insult to public decency.

Affirmed.

An indictm
person
A record o
prosec
in the
respon
belief
defens

CHIEF

The in

the —

(Kenton

ment, ha

Mackey,

Kentuck

The s

husband

person, s

nor mor

The i

statute, s

of the

court he

Section

not esser

own. Y

deemed

first ma

wife:

Archbol

By th

Code of

"a statu

concise

common

a degree

DAVIS v. COMMONWEALTH.

(13 Bush. [Ky.], 818.)

BIGAMY : *Indictment—Utah Divorce.*

An indictment for bigamy which does not allege the time and place and the person to whom the respondent was first married, is bad on demurrer.

A record of divorce which is incomplete on its face is not admissible in a prosecution for bigamy, either for the purpose of disproving the charge in the indictment or for the purpose of establishing the good faith of the respondent in contracting the alleged bigamous marriage. Her honest belief that she had been lawfully divorced from her first husband is no defense to the charge.

CHIEF JUSTICE LINDSAY delivered the opinion of the court.

The indictment in this case charges that "Eliza A. Davis, on the — day of May, 1877, in the county and state aforesaid (Kenton county, Kentucky), and before the finding of this indictment, having a husband then living, unlawfully married John Mackey, against the peace and dignity of the commonwealth of Kentucky."

The statute provides that "whoever being married, the first husband or wife, as the case may be, being alive, shall marry any person, shall be confined in the penitentiary not less than three nor more than nine years."

The indictment follows substantially the language of the statute, and is almost an exact copy of the indictment in the case of the *Commonwealth v. Whaley* (6 Bush., 266), which this court held to be sufficient.

Section 22, chap. 31 of the English statute of 9 Geo. IV., does not essentially differ either in substance or language from our own. Yet, in indictments framed under that statute, it has been deemed necessary to aver specifically the time and place of the first marriage, and to set out the name of the first husband or wife: Bishop on Criminal Procedure, volume 2, page 881; Archbold on Criminal Practice and Pleading, volume 2, p. 1024.

By the second subsection of section 122, Bullitt's Criminal Code of Practice, it is provided that the indictment must contain "a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; and with such a degree of certainty as to enable the court to pronounce judg-

ment, on conviction, according to the right of the case;" and subsection 4, section 124, provides that the indictment must be direct and certain as regards "the particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

These provisions are to be construed in the light, and according to the principles of the rule, that where the words of the statute are descriptive of the offense, the indictment will be sufficient if it shall follow the language and expressly charge the described offense on the defendant. But this rule applies only to offenses which are complete in themselves, when the acts set out in the statute have been done or performed.

Such is not the case in the crime of bigamy or polygamy. The second marriage, which is the inhibited act, is not in itself necessarily criminal. Its criminality depends upon the collateral or extrinsic facts that a former marriage has taken place, and that the first husband or wife is alive at the time of the alleged polygamous marriage. Therefore the statute in question is not in itself completely descriptive of the offense, and the rule in question is not applicable to it.

In all cases the indictment must set forth the offense charged with such a degree of certainty as will apprise the defendant of the nature of the peculiar accusation on which he is to be tried (1 Dev., 90; 18 B. Mon., 493; and 3 Met., 5), and every traversable fact must be alleged: *The State v. Labore*, 26 Vermont, 765.

The indictment against Mrs. Davis does not set out the fact of the supposed first marriage. It does charge that she had a husband living at the time of her marriage to John Mackey, and from this averment of a conclusion of law rather than of fact, it may be inferred she had been married to that husband. But such indirect pleading would not be good in a civil cause.

The appellant had the right to be informed by the indictment of the name of the person to whom the prosecution expected to prove she had been first married, and the state or country in which such alleged marriage took place.

The indictment, as drafted, made it necessary that she should stand prepared to rebut such proof as the commonwealth might make as to her former marriage to any and every man, and in any and all countries.

Tried by each and all the rules of pleading to which we have called attention, the indictment is insufficient. We must, there-

fore, assume
monveals

The co-
evidence.
missible
Davis by
record co-
in good f
the eviden
but in th
in favor
mitted to
persons v
have bee
Met., 473

But fo
is revers
criminal

FORNICATION

The Indi
be de
punis
ment
fornic
The court
and c
Utah
Fornicati
ried c
Adultery
and a
The prov
credi
cial
decre
no ju

fore, assume the responsibility of overruling the case of the *Commonwealth v. Whaley* (6 Bush., 266).

The court did not err in refusing to admit the Utah record as evidence. It is incomplete upon its face, and was clearly inadmissible to prove that the appellant had been divorced from Davis by a court of competent jurisdiction. Neither was such record competent for the purpose of proving that the appellant in good faith believed she had been divorced. In most offenses the evidence of the felonious intent may be met and rebutted; but in this the statute has fixed the exceptions, one of which is in favor of persons who have been lawfully divorced and permitted to marry; and the courts can not extend this exception to persons who have not been, but who in good faith believe they have been lawfully divorced: *Commonwealth v. Marsh*, 7 Met., 472.

But for the reasons given the judgment against the appellant is reversed, and the cause remanded with instructions to the criminal court to sustain the demurrer to the indictment.

HOOD v. STATE.

(56 Ind., 263.)

FORNICATION: Adultery — Utah divorce — Jurisdiction — Constitutional law — Criminal intent.

The Indiana statute, which provides "that crimes and misdemeanors shall be defined," etc., is repealed *pro tanto* by a later statute, prescribing a punishment for a crime which it does not define, and therefore an indictment founded upon a statute punishing "open and notorious adultery or fornication" is good, although the statute does not define the crime.

The courts of Utah have no jurisdiction to grant a divorce between residents and citizens of one of the United States, neither of whom is a resident of Utah at the time the divorce proceedings are had.

Fornication, at the common law, is sexual intercourse between a man, married or single, and an unmarried woman.

Adultery, at the common law, is sexual intercourse between a married woman and a man, married or single, other than her husband.

The provision in the constitution of the United States, that "full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state," does not include judgments and decrees which show upon their face that the courts rendering them had no jurisdiction in the premises.

The respondent had procured a divorce in Utah, which was void for want of jurisdiction. Relying upon this divorce he married and openly cohabited with another woman in Indiana. *Held*, that he was guilty of open and notorious fornication, and that his reliance on the Utah divorce was no defense, he being conclusively presumed to know the law.

PERKINS, C. J. Indictment against Nelson F. Hood for living in open and notorious fornication with one Jane Chaney. A motion to quash the indictment was overruled. Plea, not guilty. Trial by jury. Conviction. New trial denied, and the defendant sentenced, over a motion in arrest of judgment, to pay a fine of one hundred dollars, be imprisoned in county jail six months, and pay the costs of prosecution, etc.

A bill of exceptions contains the evidence.

The state proved that the appellant, Hood, was married in Clark county, Indiana, to Maggie Horton, in July, 1869, and that said Maggie is still living. The state proved further, that in June, 1876, the appellant, Hood, married Miss Jane Chaney, of the state of Kentucky, and that soon after the marriage the two took up their residence in Aurora, Dearborn county, Indiana, where they continued to reside, living together openly and notoriously as man and wife, till the finding of this indictment.

The appellant then gave in evidence parts of the statutes of Utah on the subject of divorce.

The first section of that statute confers jurisdiction upon the probate court to grant divorces. The second section provides that "the petition for a bill of divorce must be made in writing, upon oath or affirmation, and must state clearly and specifically the causes on account of which the plaintiff seeks relief. If the court is satisfied that the person so applying is a resident of the territory, or wishes to become one, and that the application is made in sincerity, and of her own free will and choice, and for the purpose set forth in the petition, the court may decree a divorce from the bonds of matrimony against the husband for any of the following causes, to wit:" [Here follows a specification of causes.]

Section three is this: "The husband may, in all cases, obtain a divorce from his wife for like causes, and in the same manner, as the wife may obtain a divorce from her husband." The statute provides further, for the service of process on persons found within the territory, and for publication of notice to those made defendants who can not be found within the territory.

The
divorce
the co

"N
Beave
"T
ant ar
ville,
since
wishes
situat
Th
divor

Th
"A.
14th
coun
accor
ant.

1876
Good
the s
the c

A
of t
of t
thus

"
of t
cou
cou
not
wit
mo
saw
of
an
bu

The appellant then gave in evidence the record of a suit for divorce, prosecuted in Utah territory. The commencement of the complaint in the suit is as follows :

"Nelson F. Hood v. Maggie H. Hood, in the probate court of Beaver county, territory of Utah.

"The plaintiff complains and alleges, that plaintiff and defendant are husband and wife; that they intermarried at Jeffersonville, state of Indiana, on the third day of July, 1869, and ever since have been, and now are, husband and wife; that plaintiff wishes to become a resident of Beaver county, Utah, but is so situated that he can not at present carry his desire into effect."

The complaint then proceeds to state grounds on which a divorce is prayed. It is signed :

"NELSON F. HOOD.

"A. GOODRICH, *Plaintiff's Attorney.*"

The complaint was sworn to in Cook county, Illinois, before "A. Goodrich, commissioner of deeds for Utah territory," on the 14th day of August, 1876, and filed in the clerk's office of Beaver county, in said territory, on the 24th day of the same month, accompanied by an affidavit of the non-residence of the defendant. This affidavit was sworn to on the 14th day of August, 1876, the day on which the complaint was verified, before "A. Goodrich, commissioner of deeds for Utah territory," apparently the same person who administered the oath of the appellant to the complaint.

After entries of further interlocutory proceedings, the calling of the defendant, the entry of her default, the hearing of proof of the allegations in the complaint, etc., the record continues thus :

"On the 4th day of October, A. D. 1876, the same being one of the days of the September term of the probate court of Beaver county, Utah territory, and the said plaintiff appearing by his counsel, A. Goodrich and Daniel Tyler, and the said defendant not appearing by herself or counsel, and having been duly served with the process of this court, as required by the statute, summons having been duly served upon her by publication of the same for forty days, in said territory, as required by the statute of Utah, and having been three times solemnly called to plead, answer or demur to plaintiff's said complaint, and coming not, but making default therein, the complaint of said plaintiff was

thereupon taken *pro confesso*. And now, again, on this the 4th day of October, 1876, it being at the September term, A. D. 1876, of court, the said cause came on for hearing before the court.

"And the court having heard the testimony in said action, from which it appears that all the material allegations in plaintiff's petition are true and sustained by the testimony, free from all legal exceptions as to the competency, admissibility and sufficiency, that the plaintiff and defendant were lawfully married at Jeffersonville, state of Indiana, on the 3d day of July, 1869, and that said parties can not live in peace and union together, and that their welfare requires a separation, and that the plaintiff wishes to become a resident of the county of Beaver, and territory of Utah, that said matters and things so alleged and proved in behalf of the plaintiff are sufficient in law to entitle the plaintiff to the relief prayed for.

"Therefore, it is ordered, adjudged and decreed, and the court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided, does order, adjudge and decree that the marriage between the said plaintiff, Nelson F. Hood, and the said defendant, Maggie H. Hood, be dissolved, and the same is hereby dissolved accordingly, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all the obligations thereof; and that all and every duty, rights, rights of dower and courtesy, claims, and claims for alimony, accruing to either of said parties by reason of said marriage, shall henceforth cease and determine, and that the said parties be severally at liberty to marry again in like manner as if they never had been married.

(Signed)

"WILLIAM JAMES COX,
"Probate Judge of Beaver County."

There was evidence tending to prove that appellant, Hood, was not within the territory of Utah during the year the above decree of divorce was granted, and had not been for years previous.

The indictment in this case was predicated upon section 21 of the act touching misdemeanors (2 R. S. 1876, p. 466), which reads thus:

"Every person who shall live in open and notorious adultery or fornication shall be fined in any sum not exceeding one thousand dollars, and imprisonment not exceeding twelve months."

The
section
offens
to be
other

The
indict
Anoth
G. &
shall
of thi
150, t
ing f
these
rule t
when
crime
flict v
the a
sion v
State
contr
Jenn
Ind.,
in W
in th
Th

gran
It
it?
suit
the p
the t
resid
part
Utah
in U
in q
Thi
nati
resp

The point is made that an indictment will not lie upon this section of the misdemeanor act, because it does not define the offenses, or either of them, named in it. Such was formerly held to be the law in this state, but latterly the law has been held otherwise.

The statute (our misdemeanor act), upon a section of which the indictment in this case is based, was approved June 14th, 1852. Another statute had been enacted on the 31st of May, 1852 (1 G. & H., 415), which declared that "crimes and misdemeanors shall be defined, and the punishment therefor fixed, by statutes of this state, and not otherwise." In *Wall v. The State*, 23 Ind., 150, this court, in construing the act of June 10th, 1852, touching felonies, and the act of May 21st, 1852, *supra*, held that these statutes cannot be construed together, but fall within the rule that a latter statute repeals a prior inconsistent one, and that whenever, after the 31st May, 1852, the legislature does create a crime by name, without defining it, such statute, being in conflict with the act of the 31st of May, *supra*, repeals that act, and the act creating a crime, without defining it, stands. This decision was followed in *The State v. Craig*, 23 Ind., 185, and in *The State v. Orkins*, 28 Ind., 364, and the earliest cases holding the contrary doctrine, viz.: *Hackney v. The State*, 8 Ind., 494; *Jennings v. The State*, 16 Ind., 335; *The State v. Huey*, 16 Ind., 338; and *Marvin v. The State*, 19 Ind., 181, are overruled in *Wall v. The State*, *supra*. We adhere to the latter decisions in the interest of legal stability.

The next question arising in the cause is this, is the divorce granted in Utah valid?

It is valid, if the court granting it had full jurisdiction. Had it? It appears by the record that the divorce was granted in a suit between two persons, neither of whom was, at the time of the proceedings, a resident of Utah, or within the boundaries of the territory, nor had previously been, but both of whom were residents and citizens of a state in the Union. Neither of the parties had placed himself or herself under the jurisdiction of Utah. Such being the case, it is well established that the court in Utah, had, and could have, no jurisdiction to grant the divorce in question, and that the same is inoperative and utterly void. This is a question to be decided by the *jus gentium*, the law of nations, the first principles of which are, that all nations, in respect to rights, are equal, and that each is sovereign within its

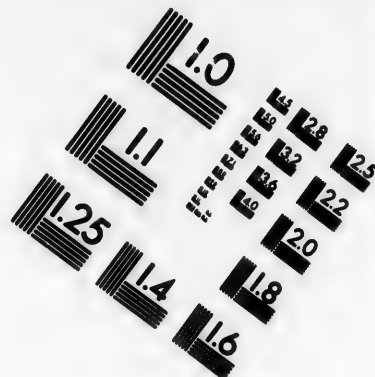
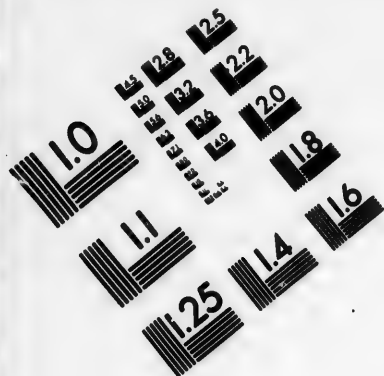
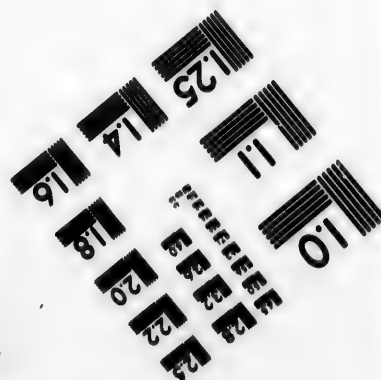
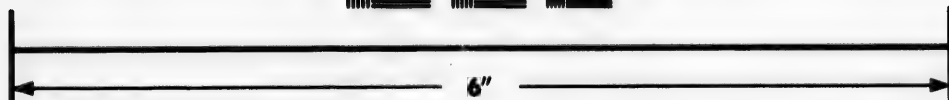
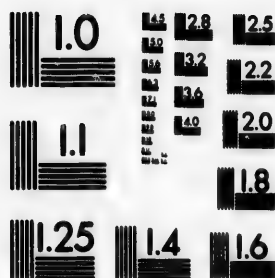


IMAGE EVALUATION TEST TARGET (MT-3)



**Photographic
Sciences
Corporation**

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 873-4303

1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0

1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0

own territory, with jurisdiction over the persons and property therein: 1 Kent Com., 21. Hood, when the divorce in question was granted, was under a jurisdiction other than that of Utah. It is further settled that the states of the Union, as between themselves, are sovereignties. In determining this question of jurisdiction, therefore, we have only to inquire what jurisdiction the state of Indiana has over the people and property within the territory of Utah; for, on this point, the states and territories are severally equal. What jurisdiction Illinois can exercise over residents and property in Indiana, Indiana can exercise over residents and property in Illinois.

To place this matter in another light, a state may authorize divorces to be granted by legislative act. Suppose, then, that the legislature of Utah had granted this divorce (neither of the parties being citizens or inhabitants of the territory), severing a domestic relation between two citizens of and residents in Indiana, would any one claim that the divorce would be valid? If it would be, then it follows that the state of Indiana can confer upon her legislature power to divorce, by statutory enactment, husbands and wives, citizens and residents of Utah, or of Illinois or Ohio. And if so, what becomes of the doctrine of the sovereignty of states and nations within their own respective territories? And if the legislature of Utah cannot grant divorces to residents and citizens of foreign states, it cannot confer such power upon the judiciary of the state. Certainly, as a general proposition, states and nations can not exercise such extra-territorial jurisdiction. But we need not enlarge upon these established elementary principles. The case before us is too plain to admit of argument. It is shortly this: Hood desired to obtain a divorce from his wife. Neither of the parties was under the jurisdiction of Utah. The petition of Hood and the decree of divorce expressly state this fact. If he was not a citizen and resident of Utah, he was of some other state or nation. Still the court of Utah grants a divorce to a man who informs it, in his application, that he is under a jurisdiction other than that of the territory of Utah, and that he is not subject to her. The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another state, and in violation of the plainest principles of international and constitutional law. The provision in the statute of Utah, authorizing her courts to grant divorces to citizens of foreign states and nations, who were not, but desired to

becom
or m
tion
the t
to gi
We
our c
Fay,
457;
artic
Ne
of th
decla
the p
state
Th
sever
had
Ind.
To
the m
case,
parti
it wa
in th
ente
coul
sion
one
9 In
merc
insti
statu
to m
25 M
that
T
ing
divo
and
havi

become, residents of Utah, was *ultra vires* and void. No plainer or more palpable case of the exercise of extra-territorial jurisdiction could exist. Hood was not only not a citizen or resident of the territory, but he did not personally enter the territory, so as to give it jurisdiction over him for temporary police purposes. We cite, on the question of jurisdiction, the following cases in our own state, and the cases referred to in them: *Sturgis v. Fay*, 16 Ind., 429; *The Eaton, etc., R. R. Co. v. Hunt*, 20 Ind., 457; *Beard v. Beard*, 21 Ind., 321; Constitution of Indiana, article 14.

Nor is the decree of divorce in this case within the operation of that clause of the constitution of the United States which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state:" Const. U. S., art. 4, sec. 1.

That clause does not include judgments and decrees which severally show upon their face that the courts rendering them had no jurisdiction in the premises: *Watts v. Borroway*, 25 Ind., 380; Cooley's Const. Lim., 2d ed., p. 17.

To avoid misconstruction, we wish it to be borne in mind that the record of the suit in the territory of Utah, in question in this case, was not one upon an ordinary simple contract between the parties who could make and rescind such contract at pleasure, but it was a suit to sever the bonds of matrimony between the parties in that suit; to dissolve a relation into which the parties could enter only in accordance with the law of the state, and which could not be dissolved by act of the parties, but only by permission of the state having, at the time, jurisdiction over both or one of them. As is well said by Stuart, J., in *Noel v. Irving*, 9 Ind., 37: "Marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. It is a status, a domestic relation resulting from a consummated contract to marry: *Ditson v. Ditson*, 4 R. I., 87; *The People v. Dawell*, 25 Mich., 247. It is to a proceeding to dissolve such a relation, that what is said in this case applies.

To give jurisdiction in a divorce suit the plaintiff, the petitioning party, must be a resident of the state or territory where the divorce is obtained. This fact gives jurisdiction of such person, and renders the divorce (notice by publication or otherwise having been given to the defendant) valid as to the plaintiff;

and, being valid as to one, public policy demands that it should be held valid as to both parties: *Tolen v. Tolen*, 2 Blackf., 407; *Jenness v. Jenness*, 24 Ind., 355; *Erving v. Erving*, 24 Ind., 468; *Ditson v. Ditson*, *supra*. Having arrived at the conclusion that the Utah divorce was void, and that appellant is still the husband of the woman whose maiden name was Maggie Horton, and that he is not the husband of Jane Chaney, we proceed to inquire whether he is shown to be guilty of the offense for which he was indicted. He was indicted for fornication. Our statute does not define fornication or adultery; but crimes, as we have seen, need not to be defined by the statute, and, consequently, the court must judicially declare the definition.

Fornication is sexual intercourse between a man, married or single, and an unmarried woman. Adultery is sexual connection between a married woman and an unmarried man, or a married man other than her own husband.

These definitions are not in accordance with some authorities, but they are with others, and, we think, the better; and they appear to us to be in harmony with the reason of things. We will limit the discussion of this topic to the question of adultery; as when we show what that is, we necessarily show what fornication is, as unlawful sexual intercourse that is not adultery is fornication.

"By the civil law, adultery could only be committed by the unlawful sexual intercourse of a man with a married woman. Thus, as is stated in Wood's Institute, 272, adultery is a carnal knowledge of another man's wife, and the connection of a married man with a single woman does not make him guilty of the crime of adultery." Dewey, J., *Commonwealth v. Cull*, 21 Pick., 509.

Bicknell, in his Criminal Practice, p. 446, thus states what he understands to be the law in Indiana on this point: "Strictly, adultery consists in carnal connection with another man's wife; such an act is adultery and not fornication: 2 Blackf., 318, and the sexual intercourse of any man with a married woman, is adultery in both, and the intercourse of a married man with an unmarried woman, is fornication in both."

In *The State v. Wallace*, 9 N. H., 515, it is held that "an unmarried man who has unlawful intercourse with a married woman, from which spurious issue may arise, is guilty of adultery."

But
learned
notice
make

"T
tained
the of
marri
innoc
them
trine
those
record
shall
referr
testim
admin
stone,

"M
adulte
follow
versat
she m
has ill
text i
challe

"I
ductio
of ad
his w
comp
for:'
to a
raised
his d
adulte
of th
const
accru
conf
any r

But the case in which the question has been more fully and learnedly examined than in any other which has fallen under our notice, is *The State v. Lash*, 1 Harrison, 380, from which we make copious extracts:

"There never was an action for adultery known to be maintained at the common law by any but a husband; showing that the offense can not possibly be committed with any other than a married woman. The heinousness of it consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance. This is the common law doctrine of adultery, transmitted to us from the earliest times, by those venerable sages who gathered it from existing precedents, records and decisions, at the times they respectively wrote. I shall cite only a few of them, because the records and decisions referred to by them have been so faithfully consulted, and the testimony of those sages examined and condensed with such admirable precision, in the imperishable commentaries of Blackstone, that it is almost vanity to go behind his work.

"More definite language can not be selected for confining adultery to illicit intercourse with a married woman than his following definition of the offense: 'Adultery, or criminal conversation with a man's wife.' The woman must not be single, she must be another man's wife, and whoever, married or single, has illicit intercourse with her becomes guilty of adultery. The text is in 3 Bl. Com., 139, and is so clear of ambiguity as to challenge any attempt to evade it.

"Let us next see how Buller, in book 1, ch. 6, of his introduction, coincides with the commentaries. He says: 'The action of adultery lies for the injury done to the husband, in alienating his wife's affections, destroying the comfort he had from her company, and raising children for him to support and provide for.' Bul. N. P., 26. He represents adultery to be an injury to a husband, exposing him to have children of another man, raised, for him to support, while he lives, and to provide for at his death. This injury to a husband is made the very gist of adultery. No one will suppose him to mean that the alienation of the wife's affections, and loss of comfort in her company, constitute the offense. The alienation of her affections might accrue from the malignancy of his own temper, and the loss of comfort in her company, from lunacy. He does not mean that any malignancy of temper, or that lunacy or any other sickness

amounts to adultery; they are only aggravations that may or may not attend the offense; therefore, the essence of adultery at the common law without which action can not be maintained, is that criminal intercourse with a *married* woman, which exposes her *husband* to support and provide for another man's issue. * * *

"Let us next take up Bacon's Abridgment, that famous repository of the common law, wherein he draws the distinction between fornication and adultery so clearly as to admit of no equivocation. He says: *Fornication* is unlawful, because children are begotten without any care for their education; but *adultery goes further*, it entails a spurious race on a party for whom he is under no obligation to provide:" Bac. Ab. Marriage and Divorce, 569.

"This is the circumstance on which adultery depends at the common law—its tendency to adulterate the issue of an innocent husband, and to turn the inheritance away from his own blood to that of a stranger. If the woman be single, her incontinence produces none of this evil; her issue takes away no man's inheritance; it can be heir to nobody, and the burthen of its support is cast by law upon herself and the partner of her guilt. * * * I will barely add that adultery, at the common law, is limited to criminal intercourse with a married woman, both by Swift and Reeve, who are among our most eminent American commentators, and that I am acquainted with no treatise on the common law, English or American, to the contrary. Whether its regulation on this point was borrowed at some early age from the Levitical law, which the early dispersion of the Jews carried into various parts of Europe, I am not able to say; but certain it is, that this wide distinction between criminal intercourse with a married woman, and a single woman, is emphatically settled in the Levitical law, the former being punished with death, while the latter was only a fine. See Levit., ch. 29, verse 10, and Deut., ch. 22, verses 22 to 28."

The opinion from which we have extracted was pronounced by Justice Ford; Chief Justice Hornblower added: "I have prepared an opinion, which it is unnecessary to read, according with that of Justice Ford."

"This question has never before been determined in this state, I believe, although the law has, ever since the year 1704, provided a punishment for the offense."

Ha
concl
nulli
Mag
Chan
with
an u
offen
and
W
appe
The
jury
It
prov
Mag
fact
the
her
It
conv
obta
toug
been
It
He
able
W
T
No
whic
wife
char
In
defer
parti
Nobl
recit
prose
both
no k

Having, in the progress of this investigation, arrived at the conclusion, as we have before stated, that the Utah divorce was a nullity, it follows that the appellant is still the husband of Maggie Horton Hood; that his pretended marriage with Jane Chaney was also a nullity, and that his living and cohabiting with her was the living and cohabiting of a married man with an unmarried woman, which, as we have seen, constitutes the offense of fornication, the offense for which appellant is indicted and prosecuted in the cause now before us.

We have looked through the proceedings on the trial, and they appear to us to have been conducted with fairness and legality. The instructions of the court stated the law with accuracy to the jury.

It is claimed in the brief of appellant's counsel, that it was not proved that the wife of appellant, whose maiden name was Maggie Horton, was still living. The record discloses that the fact was proved. It shows that she was present in court during the trial, and was pointed out to the jury by a witness who knew her as the wife of appellant.

It is claimed that the court erred in permitting evidence of a conversation at the clerk's office, in Kentucky, where Hood obtained his license to marry Miss Chaney. The evidence given touching the conversation is not in the record, and it may have been harmless.

It is urged that appellant did not intend to commit a crime. He intended to perform the acts he did perform. He is chargeable with notice of legal consequences.

We discover no error in the record.

The judgment is affirmed, with costs.

NOTE.—In *People ex rel. Commissioners v. Smith*, 20 N. Y. Sup. Ct., 414, which was a proceeding before a police justice in N. Y., for abandoning his wife and children, the defense was a divorce obtained in Utah, of the same character as that in the principal case. The divorce was held to be a nullity.

In *People v. Darcell*, 25 Mich., 247, which was a prosecution for bigamy, the defense was an Indiana divorce. The record of the divorce showed that both parties appeared in the case, and that the complainant was a resident of Noble county, Indiana, where the divorce was granted. It was held that the recitals of the record showing jurisdiction might be contradicted, and the prosecution were allowed to show, in rebuttal, that at the time of the divorce both parties were in fact residents of Michigan, and that the wife had in fact no knowledge of the proceedings, and her pretended appearance was a fraud.

STATE *v.* NEFF.

(58 Ind., 516.)

ASSAULT AND BATTERY: *Authority of Superintendent of Poor House.*

The superintendent of a county poor house has a right to use gentle and moderate physical coercion toward the inmates so far as may be necessary for the purpose of preserving quiet and subordination among the inmates, and is not guilty of assault and battery in so doing.

NIBLACK, J. This was an indictment for an assault and battery.

The substantial part of the indictment says:

"The grand jurors for Boone county, in the state of Indiana, * * * * present, that John Neff, on the 1st day of January, A. D. 1877, at the county and state aforesaid, did then and there in a rude, insolent and angry manner, unlawfully touch, strike, beat, bruise and wound one Elizabeth Wyatt."

The defendant pleaded specially to the indictment, as follows:

"Comes now the defendant, and for special plea herein says *actio non*, because, he says, that at the time and place of the alleged assault and battery mentioned in the indictment, he was the legally appointed custodian and superintendent of the county asylum for the indigent and poor of said county of Boone, and that the said Elizabeth Wyatt, the person upon whom said pretended assault and battery is charged to have been perpetrated, was, at the time and place mentioned, a pauper and an inmate of the aforesaid county asylum, duly and legally admitted therein, and under the care and custody of the defendant, and as such custodian and superintendent of said county asylum; that the said Elizabeth Wyatt, at the time of the alleged perpetration of the assault and battery charged in the indictment, was cross, stubborn, ill, disobedient and ungovernable, and was fighting and scolding other paupers and inmates of said asylum, and that the beating and striking alleged in the complaint was simply moderate and gentle coercion, administered to and upon her by the defendant, as the custodian and superintendent of the county asylum aforesaid, without anger, insolence of rudeness upon the part of the defendant, but for the purpose of preserving quiet and subordination among the inmates of said asylum, as he lawfully had the right to do, and no more."

The
suffici
demon
The
questi
the pl
Bic
well e
"It
ment
schola
proper
mann
nal be
P., 12
Law, 8
The
and as
and to
v. Hu
Regin
The
defens
ring to
truth o
the cou
The

The stat
cost
Althoug
dent
the
ings
resic

DICK
subject
V

The prosecuting attorney demurred to this plea for want of sufficient facts to constitute a defense. The court overruled the demurrer, and rendered judgment discharging the defendant.

The state brings the cause into this court by appeal on the question of law involved in the overruling of the demurrer to the plea.

Bicknell, in his *Criminal Practice*, page 296, in summing up well established defenses to charges of assault and battery, says:

"It is a good defense that the battery was merely the chastisement of a child by its parent, the correcting of an apprentice or scholar by the master, or the punishment of a criminal by the proper officer; provided the chastisement be moderate in the manner, the instrument, and the quantity of it, or that the criminal be punished in the manner appointed by law: Butler's N. P., 12." See, also, Pomeroy's Notes to 1 Archbold Criminal Law, 8th ed., p. 923; Wharton Criminal Law, sec. 1259.

The same rule applies, substantially, to keepers of almshouses and asylums for the poor, so far as necessary to preserve order and to enforce proper discipline in their establishments: *State v. Hull*, 34 Conn., 132; *Forde v. Skinner*, 4 Car. and P., 494; *Regina v. Mercer*, 6 Jurist, 243.

The facts set up in the plea, we think, were sufficient as a defense to the indictment. The prosecuting attorney, by demurring to the plea instead of taking issue upon it, admitted the truth of the facts thus set up. We see no error in the ruling of the court on the demurrer.

The judgment is affirmed.

KOLBE v. PEOPLE.

(85 Ill., 336.)

BASTARDY: *Security for costs — Non-resident prosecutrix.*

The statute of Illinois requiring a non-resident plaintiff to give a bond for costs does not apply to bastardy proceedings.

Although the complainant in a bastardy case is not and never has been a resident of the state, and the child was begotten in another state, yet when the mother, *while pregnant*, comes into the state and institutes proceedings against the putative father in the county where he is found, her non-residence is no bar to the proceedings.

DICKEY, J. This is a proceeding under our statute on the subject of bastardy. The child was begotten in Missouri, where

the complainant and the putative father then resided. When near the time of the confinement of the mother, the putative father removed to the state of Illinois. The mother, *while pregnant*, came into the state of Illinois, and into the county where the putative father was found, and instituted the proceedings before a justice of the peace of that county. The case came in regular course before the circuit court, where judgment was rendered against the putative father. He appeals to this court.

Appellant insists that the circuit court erred in refusing to dismiss the proceeding for want of bond for costs. The statute requiring bond for costs is not applicable to a proceeding of this kind, and if it were, the application, not having been made before the justice of the peace, comes too late. The ruling was right.

A graver question is presented by the objection that the complainant was not a resident of the state of Illinois, and never has been. It is strenuously insisted that this statute was enacted in the interest of the public, and for the protection of the proper county against its liability to the expense of maintaining the child as a pauper.

The language of the statute is broad, and contains no express limitation of the kind insisted upon. The case is certainly within the letter of the law. The majority of the court do not feel at liberty to hold that the operation of the statute is limited in this respect by such implication. While the statute is in the interest of the public, in some respects, still the main purpose of the statute seems to be to compel the father of a bastard child to bear part of the burden of its support. In this, the mother is chiefly interested.

We think the proceeding as it is was authorized by the statute. The judgment is, therefore, affirmed.

Judgment affirmed.

HAWKINS v. PEOPLE.

(82 Ill., 193.)

BASTARDY: *Evidence—Appeal—Non-abatement of proceedings by death of bastard.*

An objection that there was no evidence that the bastard was born or begotten in the state of Illinois, made for the first time in the Supreme Court, comes too late.

An ap
su
Proce
th
CR.
circu
tuted
bastar
It is
was be
The
to be
nant o
Revis
The
in whi
of the
was fo
The
while
begott
called
being
upon t
time r
51 Ill.,
The
nized t
ceeding
cuit co
It is
county
The ju
litigati
for hol
charact
is conta
the dec
This
79 Ill.,

An appeal lies in bastardy cases from the county to the circuit court, at the suit of the prosecuting witness.

Proceedings in a bastardy case are not abated by the death of the child, where the child was living at the time the proceedings were instituted.

CRAIG, J. This is an appeal from a judgment rendered in the circuit court of Madison county, in a proceeding originally instituted before a justice of the peace, against appellant, under the bastardy act of the state.

It is first urged that the evidence fails to show that the child was born or begotten in the state of Illinois.

The first section of the bastardy act authorizes the prosecution to be commenced in the county where the woman may be pregnant or delivered, or where the person accused may be found: Revised Laws of 1874, p. 183.

The complaint was made before a justice of Madison county, in which it is charged that appellant, of said county, is the father of the child. The return upon the warrant shows that appellant was found in the county.

These facts are sufficient to give the court jurisdiction, and while the proof upon the formal question where the child was begotten or born, or where appellant was found, was not fully called out before the jury, yet, in the absence of any question being raised in the circuit court upon the sufficiency of the proof upon this point, we must hold that the objection, for the first time raised in this court, comes too late: *Cook v. The People*, 51 Ill., 144.

The county court, before whom the appellant had been recognized to appear by the justice of the peace, dismissed the proceeding, from which judgment an appeal was taken to the circuit court by the prosecuting witness.

It is said no appeal could be taken from this order of the county court. The reason for this, however, is not apparent. The judgment of the county court was final. It terminated the litigation between the parties, and we perceive no greater reason for holding that an appeal would not lie from a judgment of this character than from a final judgment in any other case. But it is contended it was the duty of the circuit court to either affirm the decision of the county court, or to reverse and remand.

This question, however, was settled in *Holcomb v. The People*, 79 Ill., 409, where it was expressly held, that in a case of this

character, an appeal could be taken to the circuit court, and a trial *de novo* be there had.

As the decision cited is conclusive of the question presented, further discussion of the point is not deemed necessary or important.

The main question, however, relied upon by appellant to reverse the judgment is, that the death of the bastard child, before verdict, abated the prosecution.

It appears, from the record, that the child was born on the 20th day of February, 1874, and died January 9th, 1876. The suit was commenced September 11th, 1875, but the trial and rendition of judgment occurred at the March term, 1876.

Upon the trial of the issue the jury returned a verdict that appellant was the father of the bastard child, upon which the court entered an order requiring him to pay \$100 for the first year after the birth of the child, and \$40 for the second year; also, that appellant enter into bond, with security, for the payment of the money, and upon the payment of the sum of \$140 and costs of prosecution, the defendant be discharged from further liability.

The eighth section of chapter 17, revision of 1874, provides that, where the issue shall be found by the jury, against the defendant, he shall be required, by the judgment of the court, to pay \$100 for the first year after the birth of the child, and \$50 yearly for nine years succeeding said first year, and secure the payment of the money by bond, with security.

This section of the act makes no provision for an abatement of the action, for any cause, but it is claimed section 14 does. That section declares: "If the child should never be born alive, or, being born alive, should die at any time, and the fact shall be suggested upon the record of the said court, then the bond aforesaid shall from thenceforth be void."

It is clear that, if a prosecution was commenced before birth, and the child should not be born alive, the action would abate, and no judgment could be rendered against the defendant, except it might be for costs; but such is not this case.

That portion of the section which relates to a case where a child should be born alive, and subsequently die, does not profess to regulate or make any provision in regard to the money which has accrued between the birth and death of the child.

The bond referred to in the section evidently means the bond

requi
"shai
relate
becom
child.

If
case
section
preve
It
of the
tion o
princ

It
charac
mothe
Mann
Ib., 2

In
bastar
had b
"Alth
object
merely
of his
duty,
the ch
was ch
she is
escape

The
The f
immor
the su

Dur
and m
pendin
impose
but th
have g
ing th

required to be given under section eight, and the clause that it "shall from henceforth be void," no doubt was intended to relate solely to the payment of such sum of money as would become due, under the order of the court, after the death of the child.

If we are correct in this, then the section does not embrace a case like the one under consideration, nor have we found any section of the act which, by a fair or reasonable construction, will prevent a recovery in a case like this.

It has been urged on behalf of appellant that, after the death of the child, the state no longer had an interest in the prosecution of the action. This may be true, and yet not affect the principle involved.

It has been well settled in this state, that an action of this character is of a civil, and not of a criminal nature, and the mother of the child has an interest therein as well as the people: *Mann v. The People*, 35 Ill., 467; *Pease v. Hubbard*, 37 *Ib.*, 257.

In the case last cited, which was an action by a mother of a bastard child, against an officer, for permitting a defendant, who had been arrested on a bastardy warrant, to escape, it was said: "Although it is a proceeding in the name of the people, yet the object is not the imposition of a penalty for an immoral act, but merely to compel the putative father to provide for the support of his offspring. In the event of his failure to perform this duty, it devolves upon the mother, and, in case of her inability, the child becomes a public charge, as a pauper. The plaintiff was clearly injured by the negligence of the defendant, because she is left liable to a burden from which it was the duty of the escaped prisoner to relieve her."

The principle announced applies with peculiar force here. The foundation of the action is not to punish a defendant for an immoral or unlawful act, but to compel a father to contribute to the support of his offspring.

During the two years the child was living, its care, custody and maintenance devolved upon the mother. Her action was pending to compel the father to perform a duty the statute had imposed upon him. Had the child survived, it is not pretended but the money the court required the defendant to pay would have gone to the mother to re-imburse her for advances made during those two years she kept the child. In what manner the

death of the child could change rights that had accrued and become fixed, it is difficult to perceive.

The statute required the defendant to pay a certain amount, for a certain number of years, for the purpose of supporting the child. The fact that the money had not been collected for the time the child had lived did not, upon the death of the child, abate the action, or in any manner release the defendant from his liability for the support during the life of the child. This was the view taken of the case by the circuit court, and it was correct.

The judgment will be affirmed.

Judgment affirmed.

WILSON v. STATE.

(57 Ind., 71.)

CONTEMPT: *Return of service — Conclusiveness of answer under oath by respondent.*

The return of an officer showing an attempted service of a subpoena on a witness, which could not be completed by reason of the witness running away, is a sufficient basis for the issuing of an attachment against the witness for his failure to appear in obedience to the subpoena.

An attachment for a contempt in disobeying, a subpoena having been served, the defendant filed a written statement under oath denying the facts constituting the alleged contempt, and disclaiming any intention of disobeying the process of the court. *Held*, that the answer of the respondent was conclusive, and that it was error to subject the respondent to an oral examination or to hear evidence *aliunde* for the purpose of disproving the statement and establishing the alleged contempt.

NIBLACK, J. On the 29th day of March, 1879, which was during a regular term of the court below, a summons was issued for the appellant, requiring him to appear and testify as a witness before the grand jury of Hancock county, which was then in session, and was delivered to an acting deputy-sheriff of said county, who in the name of the proper sheriff returned the summons indorsed, "Served by telling defendant that I had a subpoena for him for to-day, and defendant run, and kept out of my reach, so that I could not read to him."

Upon the return of the summons, an attachment was issued against the appellant for an alleged contempt of court in disobeying its process, and he was arrested and brought into court on the attachment.

When the attachment was returned, the appellant moved the court to quash the writ, and to discharge him from custody, because no affidavit had been filed against him, alleging any contempt of court on which to base an attachment.

That motion was overruled, to which the appellant excepted. The appellant then, for the purpose of purging himself of the contempt with which he was charged, filed a statement in writing, under oath, giving a different version of what occurred when the officer attempted to serve the summons on him, and, in substance and in legal effect, denying the charge against him, contained in the sheriff's return to the summons, and particularly any intention of disobeying the process of the court.

After the appellant had thus answered in writing, the court, over his objection, compelled him to answer orally numerous questions propounded by the court concerning such alleged contempt, to which the appellant also excepted, and, after so examining him orally, the court adjudged him guilty of the contempt charged against him, and assessed a fine against him of twenty dollars, for which a judgment was rendered, with costs of suit.

The action of the court below, in overruling the motion to quash the attachment and to discharge the appellant, is assigned for error here.

This being a proceeding to punish the appellant for a constructive contempt, and being in the nature of a criminal proceeding, the case of *Whittem v. The State*, 36 Ind., 196, is relied on as authority that an affidavit ought to have been filed against the appellant before the attachment was issued.

It was said in that case that "the proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued unless upon affidavit specifically making the charge."

We think the rule thus laid down is the correct one as applied to the class of constructive contempt to which that case belonged, but this court, in commenting on that case in a subsequent opinion, said that the "ruling in that case in no manner changes the rules of law and practice as to attaching witnesses for a failure to obey the process of the court:" *Cutler v. The State*, 42 Ind., 246.

The return of the sheriff in this case supplied the place of an

affidavit, and we think laid a sufficient foundation for either a rule or an attachment.

The action of the court in requiring the appellant to answer questions orally, after he had answered in writing, under oath, is also assigned for error in this court.

The practice in this state has not been strictly uniform in the method of proceeding against the party charged upon the return of an attachment for a contempt of court.

Our courts, in some instances, have followed the old chancery practice, by hearing evidence in support, as well as in denial, of the defendant's answer, and then deciding the case on the defendant's answer, in connection with such other evidence. In other cases, it has been held that the court must decide the case on the defendant's answer to the attachment, when he has fully answered all the charges against him: *The State v. Earl*, 41 Ind., 464.

In the case of *Burke v. The State*, 47 Ind., 528, the rule governing proceedings in such cases was fully considered. It was, in substance, decided in that case that, where a person charged with a constructive contempt, in procuring a witness to absent himself, appears, and in answer to a rule makes a statement, under oath, that the matters in the affidavit against him are not true, and sets up a state of facts consistent with his innocence, and that there was no intention on his part to interfere with the process of the court, he should be discharged, and it is error for the court to proceed to hear evidence of the truth of the original affidavit and the falsity of the answer.

The rule thus laid down is well sustained by authority, and is, in our opinion, applicable to the case at bar.

Upon the authority of that case, the judgment below will have to be reversed.

The judgment is reversed, and the cause remanded for further proceedings, in accordance with this opinion.

KNOTT v. PEOPLE.

(83 Ill., 532.)

CONTEMPT: *Protection of replevied property — Practice.*

Certain property having been replevied while the suit was yet pending, the defendant in replevin took the property out of the possession of the plaintiff in replevin, and placed it beyond his reach and of the officers of

the law. *Held*, that the court had power to order the property to be restored to the plaintiff, and to enforce the order in case of its disobedience by attachment for contempt.

The respondent in an attachment for contempt having been heard, and his recognizance given to appear on a future day to abide the judgment of the court then to be delivered, cannot on that day file new affidavits and dispute the propriety of the rule which he has disobeyed.

BRESEE, J. On January 4, 1876, Loren Love executed and delivered to John Knott and Mary Knott a chattel mortgage upon certain articles of property therein described, to secure the payment of certain notes therein specified, which mortgage contained the usual stipulations for taking possession and selling by the mortgagees on certain contingencies. Some one or more of the contingencies having occurred, as the mortgagees believed, they caused some of the property to be seized, and advertised the same for sale to satisfy the indebtedness. About the 25th of February, 1876, the mortgagor, Love, instituted an action of replevin before a justice of the peace, to regain the possession of the property, and it was delivered to him under the writ of replevin. On the trial before the justice of the peace, had on the first day of March, 1876, the magistrate dismissed the suit for want of jurisdiction. From this judgment the plaintiff prayed an appeal, and perfected the same on March 3, 1876.

On the morning of the 2d day of March, appellant, with the aid of one John Fogarty, again seized the property, took it out of the possession of Love, and disposed of it in such manner as to place it beyond the reach of Love, or of the officers of the law. The replevin suit being taken to the circuit court by plaintiff's appeal, he, on the 4th day of March, moved the court for a rule upon Fogarty and Knott, to show cause, by the 6th day, why they should not return to the plaintiff the property so seized, which rule was duly served on the parties. No cause having been shown by Fogarty, the court, on the 7th of March, ordered that Fogarty restore the property to Love by Thursday morning, March 9th, or in default thereof, that he be attached for contempt. The order, as against Knott, was extended to Friday, March 10th. On that day Fogarty and Knott appeared and entered a motion to vacate and set aside the orders theretofore made. In support of and against the same, affidavits were read, and the motion denied, and thereupon an order was entered requiring Knott to restore the property to the plaintiff, Love,

before Monday morning next, March 13th, and Fogarty do the same or show cause, by the same day, why he should not be attached for contempt of court. On March 13th, on plaintiff's motion, the defendant Knott was ruled to show cause by the next day, the 14th, why he should not be attached for contempt, in disobeying the peremptory rule upon him to restore the property. On a further extension of the rule to the 16th, Fogarty and Knott were required, while the court advised in the premises, to enter into recognizances to appear on the 20th, to hear and abide the judgment of the court in the premises.

On the 20th, the defendant filed certain affidavits, which, on motion by plaintiff, the court ordered to be stricken from the files, and it then and there appearing to the court that neither of the defendants had complied with the order of the court, by restoring the property to the plaintiff Love, the court thereupon caused the defendants to be arraigned at the bar of the court, and they having failed to show any cause why they had not complied with the order of the court in the premises, it was thereupon ordered that the defendants Fogarty and Knott be committed to the county jail for the period of twenty days, and that each pay a fine of ten dollars and the costs of the proceedings, and that they stand committed until the fine and costs were paid.

To this order Knott excepted, and prayed an appeal to this court, which was granted.

The affidavits filed on the 20th were not in order, for appellant had entered into a recognizance to appear on that day to hear and abide the judgment of the court in the premises, the proofs having been taken and closed. Appellant then stood before the court as in contempt of an order which the court had a right to enter. The proofs satisfactorily show, while the action of replevin was pending, appellant, in defiance of that fact, and in contempt of the law, took the property out of the possession of the replevisor, and placed the same beyond the reach of the law, proceedings then pending in which his right so to do was involved, the result of which he, as a law abiding citizen, should have patiently awaited.

We do not see, under the circumstances, that the judgment of the court was improper, or more severe than the nature of the case demanded. The citizen must respect the law, and obey the lawful mandates of a court having competent jurisdiction of the

subject, otherwise anarchy and lawlessness will prevail to such an extent, if not checked, as to destroy all government.

The judgment must be affirmed.

BUCHMAN v. STATE.

(59 Ind., 1.)

EVIDENCE: *Expert witnesses — Right to extra compensation — Contempt.*

A physician cannot lawfully be compelled to testify as an expert to matters of medical science, against his objection, unless compensated by a proper fee, as for a professional opinion; and his refusal to testify as to matters of medical science, without such compensation, cannot be punished as a contempt.

BIDDLE, C. J., and NIBLACK, J., dissenting.

WORDEN, J. One Hamilton was on trial in the court below, on an indictment charging him with the commission of rape. On the trial he put upon the stand, as a witness, the appellant herein, Dr. Buchman, who testified as follows upon questions propounded as we suppose, viz.:

"My name is A. A. Buchman; I am a practicing physician; I have resided in Fort Wayne for two years; graduated at the College of Medicine and Surgery of Cincinnati, Ohio, in 1870, and have practiced since that time.

"Ques. State to the jury whether or not, in female menstruation, there is sometimes a partial retention of the menses after the main flow has ceased.

"Ans. I refuse to answer the question, unless I am reasonably compensated for it, before testifying as a medical expert; I do this with all respect to the court.

"Ques. What is your opinion, in case of menstruation in females, as to the menstrual flow changing in color, gradually, from red or dark, to a lighter color?

"Ans. The answer that I would have to give would depend upon my professional knowledge of the subject, and I respect-

NOTE.—The Supreme Court of Alabama, as noted in the opinion, has decided precisely the reverse of this in *Ex parte Dement*, 53 Ala., 380. For the dissenting opinion of Biddle, C. J., in which Niblack, J., concurred, see *Dill v. State*, 59 Ind., 15, where it is reported in full.

fully refuse to give my professional opinion without being compensated.

"Ques. To whom do you look for pay?

"Ans. I expect the party calling me shall compensate me, or that the court shall provide some means of compensation."

The court being of opinion that the witness was required by law to answer the question without compensation other than ordinary witness fees, and the witness persisting in his refusal to answer, he was committed as for contempt. From the commitment the witness appeals to this court.

The question presented being a novel one in Indiana, so far as we are advised, and an important one, we have bestowed such time and care upon its consideration as its importance seemed to require.

It must be, and is conceded, that a physician or surgeon, when called upon, must attend, and testify to facts within his knowledge, for the same compensation, in the way of fees, as any other witness.

In respect to facts within his knowledge, he stands upon an equality, in reference to compensation, with all other witnesses. But the question presented is, whether he can be compelled to give a professional opinion, without compensation, other than the ordinary fees of witnesses.

In England there is some diversity in the decisions in respect to the question, whether an attorney or medical man is entitled to higher compensation for attendance as a witness than ordinary witnesses. This diversity, however, relates to witnesses required to testify to facts, and not to give professional opinions. In respect to professional opinions, we are not aware of any diversity of decision.

In note two to sec. 310, 1 Greenl. Ev., 13th ed., it is said that "an additional compensation, for loss of time, was formerly allowed to medical men and attorneys; but that rule is now exploded." But a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance was essential in the cause, will in general be allowed and taxed against the losing party. See *Loneragan v. The Royal Exchange Assurance*, 7 Bing., 725; S. C., *Id.*, 729; *Collins v. Godefroy*, 1 B. and Ad., 950.

There is also a distinction between a witness to facts and a witness selected by a party to give his opinion on a subject with

which he is peculiarly conversant from his employment in life. The former is bound, as a matter of public duty, to testify to facts within his knowledge. The latter is under no such obligation; and the party who selects him must pay him for his time before he will be compelled to testify: *Webb v. Page*, 1 Car. and K., 23.

The case of *Loneragan v. The Royal Exchange Assurance*, referred to in the above note, was not the case of a witness called to give professional opinion; but the witness was a foreign sea captain, without whose presence the plaintiff's attorney "deemed it unsafe to trust the trial of the cause to written depositions, so long as he could prevail on the captain to remain in England to give his evidence personally on the trial before the jury, inasmuch as the demeanor and manner of Captain Moffatt's giving his evidence before a jury might have great weight with a jury, in addition to his intelligence and gentlemanly appearance." Tindall, C. J., said, amongst other things: "But the general rule has been, that where witnesses attend under a subpoena, none receive any allowance for loss of time except medical men and attorneys. If that rule were to undergo revision, I cannot say it would stand the test of examination. There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their personal exertions.

But that rule is not applicable to the case of a foreign witness, who may refuse to attend if the terms he proposes are not acceded to. If he asks only what is reasonable, I cannot see why it should not be allowed, and be charged to the unsuccessful party.

The case which is supposed to have exploded the rule, that attorneys and medical men are to have additional compensation for loss of time, is that of *Collins v. Godefroy*, cited in the above note. In that case, Collins sued Godefroy, to recover a remuneration for plaintiff's loss of time in attending as a witness, under a subpoena issued by Godefroy, in a case in which Godefroy was a party. The plaintiff attended six days as a witness, but was not called upon to give his evidence. Lord Tenterden, C. J., said: "If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without

consideration. We think that such a duty is imposed by law; and on consideration of the statute of Elizabeth, and of the cases which have been decided on the subject, we are all of opinion that a party can not maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain causes, of allowing, as costs between party and party, so much per day for the attendance of professional men, but that practice cannot alter the law. What the effect of our decision may be is not for our consideration. We think, on principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena."

But, notwithstanding the case above noticed, the rule allowing professional men additional compensation was followed in England as late as 1862. In the case of *Parkinson v. Atkinson*, 31 L. J. U. S. C. P., 169, the master had allowed the expenses of an attorney, who was called as a witness, but who did not give professional evidence, on the higher scale allowed to professional witnesses. On motion for a rule to show cause why the taxation should not be reviewed, Erle, C. J., said: "We do not approve of the rule which is said to prevail in criminal cases, that if a surgeon is called to give evidence not of a professional character he is only to have the expenses of an ordinary witness. We think the master was quite right in allowing the expenses of this witness on the higher scale."

So, also, in the case of *Turner v. Turner*, 5 Jur. U. S., 839, the master allowed one Marius Turner, a barrister of London, one pound and a shilling a day for attendance as a witness. The vice-chancellor said: "The right of a professional man to 1*l.* 1*s.* per day was founded on the fact of his being abstracted from his functions. It was unnecessary to say what classes came within the definition 'professional man,' but there was no doubt that a barrister did, and if subpoenaed as a witness he had a right to receive the remuneration, small and scanty as it was."

The motion to vary the taxation was overruled.

The foregoing cases, however, do not decide the point involved here, and they have been noticed, rather with a view of showing that they are not in conflict with the right claimed by the appellant, than as establishing that right.

We come now to authorities more directly in point.

The case of *Webb v. Page*, cited in the above note from

1 Gre
carryi

A v
of the
and t
the in
Maul,
in the

The
exami
upon

The
notice

In
indict
a witn
But S
arisen
in suc
to an
ness.

person
lar sci
to be
depar
nent

ness
give
arise.
justif
exper
appea
able
notic

Germa
langu
diffic

In
N. S
attor
ness,

1 Greenlf. Ev., decided in 1843, was an action for negligence in carrying goods.

A witness was called for the plaintiff, to speak to the nature of the damage sustained by the goods, consisting of cabinet work, and the expense that would be necessary to restore or replace the injured articles. The witness demanded compensation, and Maul, J., in deciding the point raised, used the language set out in the latter part of the note above cited from Greenleaf.

The witness, upon receiving an undertaking for his pay, was examined. This is the only English case that bears directly upon the point, of which we have any knowledge.

The American cases are not numerous, and we proceed to notice such as there are :

In the matter of Roelker, Sprague, 276, during a trial upon an indictment, the district attorney moved for a *capias* to bring in a witness who had been subpcœnaed to testify as an interpreter. But Sprague, J., said, "that a similar question had heretofore arisen as to experts, and he had declined to issue process to arrest in such cases. When a person has knowledge of a fact pertinent to an issue to be tried, he may be compelled to attend as a witness. In this all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled merely for the ordinary witness fee, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question would arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert. It is not necessary to say what the court would do if it appeared that no other interpreter could be obtained, by reasonable effort. Such a case is not made as the foundation of this motion. It is well known that there are in Boston many native Germans and others skilled in both the German and English languages, some of whom it may be presumed might, without difficulty, be induced to attend for an adequate compensation."

In the case of *The People v. Montgomery*, 13 Ab. Pr. Rep., N. S., 207, Montgomery was indicted for murder. The district attorney had procured the attendance of Dr. Hammond as a witness, to testify professionally in the cause, who was paid, or to

be paid, the sum of five hundred dollars for his attendance and service as such witness. This was complained of as an irregularity. The court said, E. D. Smith, P. J., delivering the opinion: "We do not see that the calling of Dr. Hammond as a witness, and the payment to him of a sufficient sum to secure his attendance at the court during the trial, was in any respect an irregularity or did any wrong to the prisoner. It seems to us that the district attorney was acting on the line of his duty as public prosecutor in securing the attendance of a proper medical witness of high repute, to meet the distinguished medical experts which he knew the prisoner expected to call on his side. * * The district attorney, it is true, might have acquired the attendance of Dr. Hammond on subpoena, but that would not have sufficed to qualify him to testify as an expert, with clearness and certainty, upon the question involved. He would have met the requirement of a subpoena if he had appeared in court when he was required to testify, and give proper impromptu answers to such questions as might then have been put to him in behalf of the people. He could not have been required, under process of subpoena, to examine the case and have used his skill and knowledge to enable him to give an opinion upon any points of the case, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony given on both sides, in order to qualify him to give a deliberate opinion upon such testimony as an expert in respect to the question of the sanity of the prisoner. Professional witnesses, I suppose, are more or less paid for their time and services and expenses, when called as experts in important cases, in all parts of the country."

These cases go far to establish the position contended for by the appellant. But, on the other hand, the case of *Ex parte Dement*, decided by the Supreme Court of Alabama, and reported in "The Reporter," vol. 5, Jan. 30, 1878, p. 138, decides that a physician or surgeon may be compelled to testify as an expert, where the testimony is relevant to a cause pending before a judicial tribunal, without being paid as for a professional opinion.

Having thus considered the cases that have come under our notice, bearing on the subject, it may be well to look at the works of text writers, for they furnish, at least, some evidence of what the law is.

In 1 Taylor's Principles of Medical Jurisprudence, p. 19, it is said that, "Before being sworn to deliver his evidence, a medical

or so
fees,
and
gene
witn
paid
payn
he co
called

In
Cont

115,
his"

he st
relati

eviden

far h
pelle

publi
servic

comp
his o

witne
for c

foreg
in an

skill
dema

servic
called

saw."

Th
Page

In
to co

not t
allow

there
witne

to a
fessio

or scientific witness may claim the payment of his customary fees, unless an arrangement has already been made between him and the solicitors who have sent him a subpoena. These fees are generally made a matter of private arrangement between the witness and the attorney." This clearly implies that he is to be paid his customary fees for an opinion, and that he may demand payment before delivering his evidence. But we doubt whether he could make the demand before being sworn; for he might be called upon to prove some fact within his knowledge.

In the Jurisprudence of Medicine, in its relation to the Law of Contracts, Torts and Evidence, by John Ordronaux, sections 114, 115, it is said: "But once put upon the stand as a skilled witness, his" (the physician's) "obligation to the public now ceases, and he stands in the position of any professional man consulted in relation to a subject upon which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property, that he cannot be compelled to bestow it gratuitously upon any party. Neither the public, any more than a private person, have a right to extort services from him in the line of his profession, without adequate compensation. On the witness stand, precisely as in his office, his opinion may be given or withheld at pleasure, for a skilled witness cannot be compelled to give an opinion, nor committed for contempt if he refuses to do so. * * As the result of the foregoing conclusions, it may be said that a witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand, from the party calling him, a compensation for his services, for there is a wide distinction between a witness thus called, and a witness who is called to depose to facts which he saw."

Then follow the remarks of Maule, J., in the case of *Webb v. Page*, which have already appeared in this opinion.

In 2 Phil. Ev., 4th Am. ed., p. 828, it is said: "With respect to compensation for loss of time, the general rule is, that it ought not to be allowed, though some compensation has been usually allowed to medical men and attorneys, but not to others. And there seems to be a reasonable distinction between the case of a witness called to depose to a fact, and one who is called to speak to a matter of opinion, depending on his skill in a particular profession or trade; the former is bound, as a matter of public duty,

to speak to the fact which has occurred within his knowledge; but the latter is under no such obligation, and is selected by the party to give his opinion merely, and he is entitled, therefore, to demand a compensation for loss of time."

In 1 Redfield Wills, note 46 to par. 51, pp. 154-5, the author says the following propositions may be of interest:

"1. It is clear that experts are not obliged to give testimony upon mere speculative grounds, and where they have no personal knowledge of the facts in the case. If they have had personal knowledge of the testator, it may fairly be regarded as amounting to the knowledge of facts. But unless that is the case, a medical witness is not obliged to obey the ordinary witness subpoena, and will not be held in contempt for disobeying it. This has been so ruled at *nisi prius* in England within the last few years.

"2. The expert is not obliged to examine books and precedents, with a view to qualify himself to give testimony; nor is he obliged to examine into the facts of cases by personal inspection of individuals whose state may be the subject of controversy in courts.

"3. It being purely matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparation to enable them to give such testimony in the market, and its price is likely to range somewhat according to its ability to aid one or other of the parties litigant. The tendency of this is to render it partizan and one-sided, as a general thing."

Judge Redfield in no manner dissents from the above propositions as legal ones, but suggests, not that experts are not entitled to be paid, but that the law should be so changed "that this class of witnesses should be selected by the court, and that this should be done wholly independent of any nomination, recommendation or interference of the parties, as much so, to all intents, as are jurors. To this end, therefore, the compensation of scientific experts should be fixed by statute, or by the court, and paid out of the public treasury, and either charged to the expenses of the trial, as part of the costs of the cause, or not, as the legislature shall deem the wisest policy."

Iowa has legislated upon the subject, so that the court is to fix the compensation, with reference to the time employed and the

degree of learning or skill required: *Snyder v. Iowa City*, 40 Iowa, 646.

These elementary authorities, and the cases of *Webb v. Page*, *The People v. Montgomery*, and *In the matter of Roelker*, *supra*, clearly and unmistakably point to the conclusion that the appellant was not bound to give his professional opinion without having been paid therefor.

It would seem, on general principles, that the knowledge and learning of a physician should be regarded as his property, which ought not to be extorted from him, in the form of opinion, without just compensation. It was said by this court of an attorney in the case of *Webb v. Baird*, 6 Ind., 13: "To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock."

The property which an attorney or physician may have in his professional knowledge, if it is to be regarded in the light of property, may not be of a tangible, corporeal character; it may be neither goods nor chattels, lands nor tenements, but it may, nevertheless, be property. A party who has a copyright in a book has a property, which consists, not in the right to the book merely, but to the exclusive right of multiplying copies thereof: 2 Cooley's Bl. Com., 405; Curtis's Copyright, 13; Copinger Law of Copyright, 1, note a.

The question has been considered thus far only upon general principles of law. We proceed now to test it by the constitution of the state. Section 21 of the bill of rights provides that, "No man's particular services shall be demanded without just compensation."

In *Israel v. The State*, 8 Ind., 467, it was held that the services of witnesses in criminal cases were not "particular services," within the meaning of the constitution. This is conceded. Witnesses who know anything of a case, however high or low, rich or poor, learned or unlearned, they may be, or whether occupying public or private stations in life, all stand upon an equality in this respect, and must attend as witnesses, without other compensation than that provided by law. This is a burden that falls upon all alike. The witnesses are bound to attend, and, in the language of some of the authorities before cited, "speak to the facts which have occurred within their knowledge." But the case decides nothing upon the point here involved. The case of *Blythe v. The State*, 4 Ind., 525, however, is exactly in point in

principle. There Blythe, an attorney of the court, was appointed to defend a pauper on the charge of larceny. Blythe denied the right of the state, or the court, to demand his professional services without compensation, and refused to act. For this refusal the court adjudged him guilty of contempt. This court held, under the provision of the constitution above set out, that he was not bound to perform the service.

In *Webb v. Baird*, 6 Ind., 13, Baird had been appointed to defend a pauper, on a criminal charge, and had performed the service; and the question involved was, whether he was entitled to compensation from the county. Judge Stuart said, in delivering the opinion of the court, "that any class should be paid for their particular services in empty honors, is an absolute idea belonging to another age and to a state of society hostile to liberty and equal rights. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services of a particular class in effect imposes a tax to that extent upon such class, clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens."

But, if the professional services of a lawyer cannot be required in a civil or criminal case without compensation, how can the professional services of a physician be thus required? Is not his medical knowledge his capital stock? Are his professional services more at the mercy of the public than the services of a lawyer? When a physician testifies as an expert, by giving his opinion, he is performing a strictly professional service. To be sure, he performs that service under the sanction of an oath. So does the lawyer when he performs any service in a cause. The position of a medical witness, testifying as an expert, is much more like that of a lawyer than that of an ordinary witness, testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved. Is not this also the province and business of an attorney? And are not the services of each equally "particular?" All attempts to make a difference in the two cases are but losing sight of the substance, and grasping at the shadow.

If physicians or surgeons can be compelled to render professional services by giving their opinions on the trial of criminal causes, without compensation, then an eminent physician or surgeon may be compelled to go to any part of the state, at any and all times, to render such service, without other compensation than such as he may recover, as ordinary witness fees, from the defendant in the prosecution, depending upon his conviction and ability to pay. This, under the general principles of law and the constitution of the state, he cannot be compelled to do. If he knows facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within the knowledge, his qualifications as a physician or surgeon are entirely unimportant. In respect to facts, as before stated, he stands upon an equality with all other witnesses, and the law, as well as his duty to the public, requires him to attend and testify for such fees as the legislature has provided. Not so, however, in respect to his professional opinions. In giving them, he is performing a "particular" service, which can not be demanded of him without compensation.

The 13th section of the bill of rights provides that, in all criminal prosecutions, the accused shall have the right to have compulsory process for obtaining witnesses in his favor.

This prosecution has no bearing upon the question involved. The term "witnesses," as thus used, was used in its ordinary sense, as embracing those who know or are supposed to know some fact or facts pertinent to the cause. But the physician or surgeon, when giving his professional opinion in a court, does not, as before stated, occupy the position of a witness testifying to facts. He performs the service under oath, to be sure, and this is the only circumstance from which he can be called a witness at all. So the judge upon the bench, the lawyer at the bar, and the jury in the jury-box, all perform their services under oath.

It is not necessary to determine in this case whether all classes of experts can require payment before giving their opinions as such. It is sufficient to say that physicians and surgeons whose opinions are valuable to them as the source of their income and livelihood, can not be compelled to perform service by giving such opinions in a court of justice without such payment.

The appellant could not have been legally required to answer

the questions propounded to him, without compensation, and his commitment for contempt was erroneous.

The judgment below is reversed and the cause remanded.

ANDERSON v. STATE.

(41 Wis., 430.)

EVIDENCE: *Degree of proof — Reasonable doubt — Erroneous charge.*

A charge that "In order to convict, the evidence should be such as to convince you, as reasonable men, that the charge is true. If, as reasonable men, *guided by that prudence and reason which govern you in the ordinary conduct of your affairs*, you have a doubt of the defendant's guilt, you should acquit," is erroneous. The jury might well have understood from it that if in their ordinary affairs they would, upon the evidence before them, adopt and act upon the hypothesis that the accused was guilty of the crime charged, they should convict him.

LYON, J. The plaintiff in error was tried upon an information charging him with the crime of rape, and was convicted thereof, and sentenced to imprisonment for a term of years in the state prison. The judgment comes here for review on a writ of error.

On the trial the judge instructed the jury (among other things) as follows: "In order to convict, the evidence should be such as to convince you, as reasonable men, that the charge in the information is true. If, as reasonable men, *guided by that prudence and reason which govern you in the ordinary conduct of your affairs*, you have a doubt of the defendant's guilt, you should acquit."

One of the errors assigned is the giving of the above instruction.

Without doing any violence to the language of the above instruction, we think the jury might well have understood from it that if, in their ordinary affairs they would, on the evidence before them, adopt and act upon the hypothesis that the plaintiff in error was guilty of the crime charged, they should convict him. It may be the learned circuit judge did not intend to lay down that proposition; yet, if the instruction might reasonably have been so understood by the jury, the effect upon the judgment is the same as though the proposition had been stated in unmistakable language.

It seems to us that the proposition is unsound, and that the instruction exposed the plaintiff in error to conviction on insufficient evidence. The truth is, that in their ordinary affairs, men accept and are entirely satisfied with less conclusive evidence of the existence of the facts which control their action, than they would accept or be satisfied with in affairs of greater importance. The more important the matter, the closer will be the scrutiny of the evidence; and such scrutiny may develop reasonable doubts of the existence of the facts which otherwise would not have arisen.

To illustrate, suppose a person cognizant of the evidence in this case were determining whether he would employ the plaintiff in error as his servant. If the latter is innocent of the crime charged, such person would so employ him; if guilty, he would not. This is an ordinary affair, which does not call for any very close or careful scrutiny of evidence; and the positive testimony of the prosecutrix, that the plaintiff in error ravished her, might be satisfactory proof of his guilt. But make it the duty of such person to scan the evidence with the greatest caution and care, and he might discover in it that which would raise very grave doubts in his mind of the guilt of the accused.

A person accused of crime is entitled to have the evidence against him closely and carefully considered, and can only be lawfully convicted when, after such scrutiny, the jury can say upon their oaths that the evidence leaves in their minds no reasonable doubt of the guilt of the accused. The absence of the doubt of guilt, when the measure and limit of the scrutiny is that which reasonable men would exercise in the ordinary affairs of life, is not sufficient, for it does not necessarily result therefrom that the evidence properly considered would leave no such doubt.

This, therefore, is the infirmity of the instruction. It gave a wrong basis or stand-point from which the jury were to determine the presence or absence of a reasonable doubt, and exposed the plaintiff in error to a conviction on insufficient evidence. If the learned circuit judge desired to make use of any such analogy, he should have told the jury that it was their duty to scrutinize the evidence with the utmost caution and care, bringing to that duty the reason and prudence which they would exercise in the most important affairs of life—in fact, all the judgment, caution and discrimination they possessed; and then, unless they could

say from that stand-point, that the evidence failed to impress their minds with any reasonable doubt of guilt, they should acquit the accused. Had such an instruction been given and observed, a verdict of acquittal might have been rendered, for a careful scrutiny of the whole testimony might well have left a reasonable doubt whether the elements of force entered into the transaction upon which the information is predicated, if there was any such transaction.

The foregoing views are sustained by authority. In the recent case of *State v. Rour*, decided by the Supreme Court of Nevada, an abstract of which will be found in the Law and Equity Reporter, Vol. 3, No. 14 (p. 422), the court, in a careful and extended review of the authorities, held the following instruction erroneous: "By reasonable doubt, is meant such a doubt as would govern or control you in your business transactions or usual pursuits of life." The court, by Hawley, C. J., say that, "to ascertain the truth of any given proposition with reference to the ordinary and usual business transactions of life, men are governed and controlled as juries are in deciding civil cases, by a preponderance of evidence. Men frequently act "in the business transactions or usual pursuits of life" without any firm or settled conviction that the conclusion upon which they act is correct. * * * The preponderance or weight of testimony upon which men would ordinarily be willing to act in "their business transactions or in the usual pursuits of life," is not the rule that should govern jurors in deciding questions that involve the life or liberty of an individual. This case expressly overrules that of *State v. Millain*, 3 Nev., 409, in which, without argument or citation of authority, the same court, in 1867, upheld a similar instruction in a criminal case.

On similar reasoning it was held, in *Jane v. The Commonwealth*, 2 Met. (Ky.), 30, that the following instruction was erroneous:

"The jury should weigh and consider all the facts and circumstances proven to their satisfaction, in connection and combination, and should hold them and pass judgment on them in that condition; and if the conclusions from the facts and circumstances so proven to their satisfaction be, that there is that *degree of certainty* in the case that they would act on it in their own grave and important concerns, that is the degree of cer-

tainty which the law requires, and which will justify and warrant them in returning a verdict of guilty.

We are aware that the language of the instruction in the present case is not the same as in the Nevada and Kentucky cases, and perhaps a close analysis of it might disclose a different meaning. But it was addressed to men who had no opportunity for close analysis, and who, as already observed, might well have understood it as asserting the rule of the instructions in those cases.

Several other questions of importance were argued at the bar, but we feel ourselves relieved from the duty of passing upon them.

Because of such erroneous instruction, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the court. So ordered.

COMMONWEALTH v. HAWES.

(18 Bush. [Ky.], 697.)

EXTRADITION.

The respondent was extradited from Canada under the Ashburton treaty of 1842, to be tried on three separate indictments for forgery. On two of these he was tried and acquitted, and the third was dismissed. It was then sought to try him for embezzlement, there being then pending against him indictments of embezzlement and uttering forged paper. On motion of the respondent, based on affidavits showing the facts of the extradition, it was held that he was entitled to be discharged from arrest and afforded a reasonable opportunity to return to Canada before any proceedings could be taken against him on any charge not named in the warrant of extradition.

LINDSAY, C. J. Smith N. Hawes stood indicted in the Kenton criminal court for uttering forged paper, for embezzlement, and also upon four separate and distinct charges of forgery. He was found to be a resident of the town of London, in the Dominion of Canada, and in February, 1877, was demanded by the President of the United States, and surrendered by the Canadian authorities, to answer three of said charges of forgery. As to the fourth charge, the evidence of his criminality was not deemed sufficient, and that alleged offense was omitted from the warrant of extradition. The demand and surrender were made in virtue

of and pursuant to the 10th article of the treaty concluded August 9, 1842, between the Kingdom of Great Britain and the United States of America.

The attorney for the commonwealth caused two of the indictments for forgery to be dismissed. Hawes was regularly tried under each of the remaining two, and in each case a judgment of acquittal was rendered in his favor upon verdicts of not guilty.

After all this, however, the officers of Kenton county continued to hold him in custody; and finally, on motion of the attorney for the commonwealth, one of the indictments for embezzlement was set down to be tried on the 6th day of July, 1877. Further action was postponed from time to time until the 21st of August, 1877, when Hawes presented his affidavit setting out all the facts attending his surrender and the purposes for which it was made, and moved the court to continue all the indictments then pending against him, and to surrender him to the authorities of the United States, to be by them returned, or permitted to return, to his domicile and asylum in the Dominion of Canada. This motion was subsequently modified to the extent that the court was asked to set aside the returns of the sheriff on the various bench warrants under which he had been arrested, and to release him from custody. The court, in effect, sustained this modified motion, and ordered "That the cases of the *Commonwealth of Kentucky v. Smith N. Hawes*, for embezzlement and for uttering forged instruments with intent, etc., be continued, and be not again placed on the docket for trial, and that said Hawes be not held in custody until the further order of this court."

From said order the commonwealth has prosecuted this appeal. It is not final in its nature, but under the provisions of sections 335 and 337 of the Criminal Code of Practice it may, nevertheless, be reviewed by this court.

It was the opinion of the learned judge (Jackson), who presided in the court below, that the 16th article of the treaty of 1842 impliedly prohibited the government of the United States and the commonwealth of Kentucky from proceeding to try Hawes for any other offense than one of those for which he had been extradited, without first affording him an opportunity to return to Canada; and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial.

The correctness of this opinion depends on the true construction of the 10th article of the treaty, and also on the solution of the question as to how far the judicial tribunals of the federal and state governments are required to take cognizance of, and in proper cases to give effect to treaty stipulations between our own and foreign governments.

Section 2, article 6 of the federal constitution declares that, "This constitution, and the laws of the United States made in pursuance thereof, and all treaties made, or which may be made under the authority of the United States, shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding." It will thus be seen that with us a public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the general government, but a living law, operating upon and binding the judicial tribunals, state and federal, and the tribunals are under the same obligations to notice and give it effect as they are to notice and enforce the constitution and the laws of congress made in pursuance thereof.

"A treaty is, in its nature, a compact between two nations, and not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra-territorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision." *Foster v. Neilson*, 2 Peters, 253, per Chief Justice Marshall.

When it is provided by treaty that certain acts should not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

A different rule seems to have been initiated in the case of

Caldwell (8 Blatchford C. C. Reports, 131); but the real decision rendered in that, as in the subsequent case of Lawrence (13 Blatchford C. C. Reports, 295), decided by the same judge, was, that extradition proceedings had pursuant to the treaty under consideration do not, by their nature, secure to the person surrendered immunity from prosecution for an offense other than the one upon which the surrender is made; and the intimation in Caldwell's case that the judiciary may leave it to the executive department to interfere to preserve and protect the good faith of the government in a case like this, is at the most but a *dictum*.

The 10th article of the treaty of 1842 is as follows: "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

It will be seen that the trial and punishment of the surrendered fugitive for crimes other than those mentioned in the treaty, is not prohibited in terms, and that fact is regarded as of controlling importance by those who hold to the view that Hawes was not entitled to the immunity awarded him by the court below. But if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature

of the subject about which they were treating, it is entitled to like respect, and will be as sacredly observed as though it was expressed in clear and unambiguous terms.

Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction and the same course of reasoning which we apply to the interpretation of private contracts.

By the enumeration of seven well defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offense not named in the enumeration, no matter how revolting or wicked it may be.

By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language.

It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should under any circumstances be compelled to defend himself against a charge other than one upon which he is surrendered, much less against one for which his extradition could not be demanded. The consequences to which the opposite view may lead, though by no means conclusive against it, are nevertheless to receive due and proper weight.

It would present a remarkable state of the case to have one government saying, in substance, to the other, "You cannot demand the surrender of a person charged with embezzlement; my judges or other magistrates have no right or authority upon such a demand, either to apprehend the person so accused or to inquire into the evidences of his criminality, and if they should assume to do so, and should find the evidence sufficient to sustain the charge, the proper executive authority could not lawfully issue the warrant for his surrender. But you may obviate this defect in the treaty by resting your demand upon the charge of

forgery, and if you can make out a *prima facie* case against the fugitive, you may take him into custody, and then without a breach of faith, and without violating either the letter or spirit of our treaty, compel him to go to trial upon the indictment for the non-extraditable offense of embezzlement."

And if this indirect mode of securing the surrender of persons guilty of other than extraditable offenses may be resorted to, or if the demand, when made in the utmost good faith to secure the custody of a criminal within the provisions of the treaty, can be made available to bring him to justice for an offense for which he would not have been surrendered, then we do not very well see how either government can complain if a lawfully extradited fugitive should be tried and convicted of a political offense. Prosecutions for the crime of treason are no more provided against by the treaty than prosecutions for the crime of embezzlement, or the offense of bribing a public officer.

Mr. Fish, in his letter of May 22, 1876, to Mr. Hoffman, in reference to the extradition of Winslow, attempts to meet this difficulty by saying, that "Neither the extradition clause in the treaty of 1794, nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guaranties were required of each other against a thing inherently impossible, any more than by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

But President Tyler, under whose administration the treaty of 1842 was concluded, evidently thought the guaranties of immunity to political refugees were to be implied from the treaty itself, and not left to rest alone on the public sentiment of the two countries. In communicating a draft of the treaty to the senate for its ratification, speaking of the subject of extradition, he said: "The article on the subject in the proposed treaty is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges arising from wars or intestine commotions — treason, misprision of treason, libels, desertion from military service, and

other
pretat
the li
a pap
who
negot

It s
by th
that y
that s
States
autho
son se
tried
precis
out in
impli
may l
extrac
dema

Th
in 18
the tr
an im
effect
rience
comm
warpe
some
cide,
Athe
in 18
perso
whic
After
by th
secre
perso
shall
gover
be ac

other offenses of similar character are excluded." This interpretation was contemporaneous with the treaty itself, and deserves the higher consideration, from the fact that it was contained in a paper prepared by the then secretary of state, Mr. Webster, who represented the government of the United States in the negotiations from which it resulted.

It seems also that the treaty was understood in the same way by the British parliament in 1843. The act of parliament of that year passed for the purpose of carrying it into effect, directed that such persons as should thereafter be extradited to the United States should be delivered "to such person or persons as shall be authorized in the name of the United States to receive the person so committed, and to convey him to the United States, to be tried for the crime of which such person shall be accused." The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives by necessary implication the right here claimed, that the person surrendered may be tried for an offense different from that for which he was extradited, and one for which his surrender could not have been demanded.

The American executive in 1842, and the British parliament in 1843, seem to have been impressed with the conviction that the treaty secured to persons, surrendered under its provisions, an immunity from trial, for political offenses, far more stable and effectual than the public sentiment of the two countries. Experience had taught them that, in times of intestine strife and civil commotions, the most enlightened public sentiment may become warped and perverted, just as it had taught mankind that man is sometimes capable of committing the unnatural crime of parricide, although such a crime seemed impossible to the great Athenian law-giver. And this view was adhered to by congress in 1842, when the general law providing for the surrender of persons charged with crime, to the various governments with which we had treaty stipulations on that subject, was passed. After setting out the necessary preliminary steps, it was provided by the third section of that act, that "It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be accused."

This, like the act of parliament, declares the purpose of the surrender to be, that the alleged offender may "*be tried for the crime of which such person shall be accused.*"

The maxim, *expressio unius est exclusio alterius*, may, with propriety, be applied to each of these acts; and, read in the light of that maxim, they are persuasive, at least, of the construction which, up to 1848, the two contracting parties had placed on the tenth article of the treaty.

The act of congress is, in one view, more important than the British act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principles of the international practice of extradition.

The ancient doctrine, that a sovereign state is bound by the laws of nations to deliver up persons charged with or convicted of crimes committed in another country, upon the demand of the state whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction, like Kent and Story, but the doctrine has long prevailed with us, that a foreign government has no right to demand the surrender of a violator of its laws, unless we are under obligations to make the surrender in obedience to the stipulations of an existing treaty. (Lawrence's *Wheaton on International Law*, 233, and authorities cited.) As said by Mr. Cushing, in the matter of Hamilton, a fugitive from justice in the state of Indiana, "It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign government, unless in cases for which stipulation is made by express convention." (Opinions of Attorney-generals, vol. 6, 431.)

From the treatise of Mr. Clarke on the subject of extradition, we feel authorized to infer that this is the English theory; but whether it is or not, that government certainly would not, in the absence of treaty stipulations, surrender fugitives to a government which, like ours, will refuse to reciprocate its acts of comity in this respect.

The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and

restricted by the provisions, express and implied, of the treaty. The fugitive Hawes, by becoming an inhabitant of the Dominion of Canada, secured the protection of British laws, and we could only demand his surrender in virtue of our treaty with that government, and we held him in custody for the purposes contemplated by that treaty, and for none other. He was surrendered to the authorities of Kentucky, to be tried upon three several indictments for forgery. The Canadian authorities were of opinion that the evidences of his criminality were sufficient to justify his commitment for trial on said charge. One of them the commonwealth voluntarily abandoned. He was tried upon the remaining two, and found not guilty in each case by the jury, and he now stands acquitted of the crimes for which he was extradited. It is true, he was in court, and in the actual custody of the officers of the law when it was demanded that he should be compelled to plead to the indictment for embezzlement. But the specific purposes for which the protection of the British laws had been withdrawn from him, had been fully accomplished, and he claimed that, in view of that fact, the period of his extradition had been determined; that his further detention was not only unauthorized, but in violation of the stipulations of the treaty under which he was surrendered, and that the commonwealth could not take advantage of the custody in which he was then wrongfully held, to try and punish him for a non-extraditable offense.

To all this it was answered, that "an offender against the justice of his country can acquire no rights by defrauding that justice;" that "between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm." Such is the doctrine of the cases of Caldwell and Lawrence (8 and 13 Blatchford's Reports), and of the case of Lagrave (59 New York). And if the cases of Caldwell and Lawrence could not be freed from the complications arising out of the residence of the prisoners within the territorial limits of the British crown, and the fact that we received them from the authorities of the British government, in virtue of and pursuant to treaty stipulations, it would be sound doctrine and indisputable law.

But did Caldwell or Lawrence come within the reach of the arms of our laws? They were surrendered to us by a foreign

sovereign, to be tried for specific crimes, and were forcibly brought, for the purposes of those trials, within the jurisdiction of our courts. And the point in issue was not whether the prisoners had secured immunity by flight, but whether the court could proceed to try them without disregarding the good faith of the government, and violating the "supreme law."

The legal right of a judicial tribunal to exercise jurisdiction in a given case must, from the nature of things, be open to question at some stage of the proceeding, and we find it difficult to conceive of a person charged with crime being so situated as not to be permitted to challenge the power of the court assuming the right to try and punish him.

The doctrine of the cases of Caldwell and Lawrence has been sanctioned by several prominent British officials and lawyers, and has seemingly been acted upon by some of the Canadian courts, and in one instance [that of Herlbrown] by an English court. We say seemingly, for the reason that in Great Britain treaties are regarded as international compacts, with which, in general, the courts have no concern. They are to be carried into effect by the executive, and the courts are subject to executive control to the extent necessary to enable it to prevent the breach of treaty stipulations in cases of this kind. Hence, when a party charged with crime claims immunity from trial on account of the provisions of the treaty under which he has been extradited, he must apply to the executive to interfere through the law officers of the crown to stay the action of the court, otherwise it will not at his instance stop to inquire as to the form of his arrest, or as to the means by which he was taken into custody.

But a different rule prevails with us, because our government is differently organized. Neither the federal nor state executive could interfere to prevent or suspend the trial of Hawes. Neither the commonwealth's attorney nor the court was to any extent whatever subject to the direction or control either of the President or the Governor of the commonwealth. But the treaty under which the alleged immunity was asserted being part of the supreme law, the court had the power, and it was its duty if the claim was well founded, to secure to him its full benefit. The question we have under consideration has not been passed on by the Supreme Court of the United States, and it therefore remains so far an open one, that we feel free to decide it in

accordance with the result of our own investigations and reflections.

Mr. William Beach Lawrence, in the 14th vol., p. 96, Albany Law Journal, on the authority of numerous European writers, said, "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and consequently, when the treaty prescribes the offenses for which extradition can be made and the peculiar testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the state receiving the fugitive has no jurisdiction whatever over him except for the specified crime to which the testimony applies.

This is the philosophy of the rule prevailing in France. The French minister of justice in his circular of April 15, 1841, said, "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into."

The rule as stated by the German author, Heffter, is that "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition."

And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offenses, and when the British parliament and the American congress assumed to provide that the persons extradited by their respective governments should be surrendered "*to be tried for the crime of which such person shall be so accused*," this dominant principle of modern extradition was both recognized and acted upon.

This construction of the 10th article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but essential to render it absolutely certain that the treaty can not be converted into an instrument by which to obtain the custody and secure the punishment of political offenders.

Hawes placed himself under the guardianship of the British

laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition. He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the federal constitution, or through the comity of a foreign government. But we could not add to or enlarge the conditions and lawful consequences of his extradition, nor extend our special and limited right to hold him in custody to answer to the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited.

We conclude that the court below correctly refused to try Hawes for any of the offenses for which he stood indicted, except the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

The order appealed from is approved and affirmed.

NOTE.—On the 12th day of February, 1876, E. D. Winslow, of Boston, was arrested in London on a telegram from Hamilton Fish, then secretary of state, to await a requisition for forgeries. A police officer immediately sailed for England provided with the necessary papers to secure Winslow's extradition. Before the requisition for his surrender was made, the British minister at Washington suggested to the secretary of state that the demand for Winslow's surrender would probably be refused unless a stipulation was entered into that he should not be tried upon any offense other than that for which he was extradited; whereupon the secretary of state immediately instructed Gen. Schenck, then the American minister in England, to decline to enter into any such stipulation, provided it should be required by the British government. Winslow's extradition was formally demanded and the necessary papers and proofs presented. The British government refused to surrender him unless the United States would give assurances that Winslow should not be tried for any offense not named in the warrant of extradition. A long diplomatic correspondence ensued between the two governments, and neither of them receding from its position, Winslow, after several remands, was discharged from custody on *habeas corpus* on the 17th of June. In a message to congress on the 20th, President Grant announced that the United States considered the extradition clause of the Ashburton treaty practically abrogated by the action of the British government in Winslow's case, and

that thereafter the government would not make or entertain demands for the extradition of criminals, so long as Great Britain should insist upon its position. On the 4th of April of the same year, pending the negotiations in Winslow's case, one Maraine Smith was arrested and committed to jail in Sandwich, Ontario, to await extradition proceedings for a murder in Detroit. On the 11th of April the governor of Michigan requested the secretary of state to take proper steps to secure his extradition, but he declined to make a demand. On the 30th of June a fugitive from justice from Ohio was arrested and committed to jail at Hamilton, Ontario, to await extradition proceedings, but Secretary Fish refused to make any demand for his surrender, as he had already done in the case of Maraine Smith. In the correspondence which will be found reported at large in the report on Foreign Relations, 1876-1877, many cases were cited sustaining the position of the American government. The secretary refers to the case of Heilbronn, who was extradited to Great Britain for forgery, and having been acquitted of that charge, was tried on a charge of larceny and convicted. In the case of Von Earnam (Upper Canada Reports, 4 c., p. 288), who had been extradited for forgery, an application having been made for his discharge (before trial) on the ground that the only offense he had committed was false pretenses, the application was refused, the chief justice saying that, "being in custody, he is liable to be prosecuted for any offense which the facts may support." In Paxton's case (10 Lower Canada Jurist, 212, 11, 352), to an indictment for uttering forged paper, the respondent pleaded that he had been extradited for forgery. The plea was held bad, and Paxton was tried and convicted, and the conviction was affirmed on appeal. In *U. S. v. Caldwell* (8 Blatchf. C. C., 131), the prisoner having been extradited from Canada on a charge of forgery, was put upon trial for bribing a revenue officer. He pleaded to the jurisdiction setting up the facts. On demurrer to the plea, the plea was held bad, the court saying that, "While abuse of extradition proceedings and want of good faith in reverting to them, doubtless constitute a good cause of complaint between governments, such complaints do not form a proper subject of investigation in the courts." The British government having been appealed to to intervene on Caldwell's behalf, replied May 16, 1871, "There is nothing in the convention which would preclude the indictment of the petitioner in the United States for any additional offense which is not enumerated in the convention, so long as such proceedings were not substituted for proceedings against him on the charge by reason of which he was surrendered.

Oct. 27, 1876, the British government receded from the position it had taken in the Winslow case, and the British minister at Washington notified Secretary Fish that fugitives who came within the terms of the treaty would be surrendered without the stipulation which had previously been insisted upon. Since that time the extradition clause of the treaty of 1842 has been carried out as usual. So far, therefore, as this is a political and diplomatic, and not a legal question, it must be regarded as settled in favor of the right to try the fugitive for offenses not named in the warrant of extradition. But a treaty is as much a part of the law of the land as a statute or the constitution, and the judicial branch of the government being co-ordinate with the executive and legislative branches, and all the judicial power being vested in the courts, the courts are not bound by the executive interpretation of the treaty, but must themselves interpret it in all cases properly before them in which its scope and meaning properly come in question.

In *Adrianne v. Lagrave*, 59 N. Y., 110, the defendant was arrested on civil process for a wrongful conversion. He moved to vacate the order of arrest on the ground that he had been brought into New York on a warrant of extradition from France, and that he was arrested on the civil process before he had had an opportunity of returning to France after the proceedings in the matter for which he was extradited had terminated. The defendant also alleged that the extradition proceedings were fraudulent, and they were taken for the purpose of bringing him within the jurisdiction of the courts of New York, that he might be arrested and detained on civil process. The motion was denied, and on appeal to the court of appeals, it was held to have been properly denied. The court say, "While we appreciate the justice and fairness in the abstract of the principle * * * in view of the authorities referred to, and in the absence of any legal principle on which it can rest, we do not feel justified in holding that there is such an implied obligation which can be enforced by the courts, at the instance of the defendant, as will prevent a prosecution for other offenses or civil liabilities."

This case and the case of *U. S. v. Caldwell*, above cited, are followed and approved in *U. S. v. Lawrence*, 13 Blatchf., 295. In *Williams v. Bacon*, 10 Wend., 636, the defendant moved to set aside a *capias* in a civil case under which he had been arrested and held to bail, on the ground that he had been brought from Massachusetts on an extradition warrant for false pretenses, and that he was privileged from arrest on any other charge until he had an opportunity to return to Massachusetts. The motion was denied, but the court (Nelson, J., delivering the opinion) say, "There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civilliter*. The argument of the defendant's counsel in this particular is not supported by the facts of the case. Had such fact appeared, the defendant would have been discharged. As it is, the motion is denied with costs."

Against these authorities, and in support of the doctrine of *Com. v. Haves*, can be cited the great authority of Judge Cooley, the author of Cooley's Constitutional Limitations. That learned jurist in an article published in the *Princeton Review* of January, 1879, uses the following language: "To obtain the surrender of a man on one charge and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule, that where, by compulsion of law, a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraint for another purpose. The legal privileges from arrest when one is in the performance of a legal duty away from his home rest upon this rule, and they are merely the expressions of reasonable exception from unfair advantages. The reason of the rule applies it to these cases: it should be held, as it recently has been in Kentucky (*Com. v. Haves*), that the fugitive surrendered to one charge is exempt from prosecution upon any other. He is within the state by compulsion of law upon a single accusation; he has a right to have that disposed of, and then to depart in peace."

EX PARTE ROSENBLATT.

(51 Cal., 285.)

EXTRADITION: *Fugitives from justice — Criminal vs. civil process.*

Although, under the constitution of the United States and the act of congress, a state is only bound to surrender a fugitive from justice for whom a requisition has been issued by the governor of a sister state, yet the legislature, upon principles of comity, may provide for the arrest and detention of such fugitive before the requisition has arrived, and may accompany the act for the arrest by as many conditions (favorable to the alleged fugitive) as to his mode of arrest and examination as it may see fit, and such act must be strictly complied with.

An officer, armed with process for the arrest of a person in a civil suit, cannot take the defendant from the hands of another officer who holds him on a warrant issued in a criminal case; nor can he hold such person as against one armed with a criminal warrant, and the same rule applies to a proceeding under a requisition from the governor of another state asking for his return as a fugitive from justice.

On the 20th of January, 1876, Rosenblatt was arrested in San Francisco by the chief of police on a warrant issued by the judge of the police court, charging him with being a fugitive from justice, and with having fled from the city and state of New York, where he had committed the crime of obtaining money under false pretenses. The judge continued the hearing of the case from time to time until the 29th of January. In the mean time, on the 25th of January, A. Fleishacker commenced a civil suit against Rosenblatt to recover \$5,000, due him on a promissory note, and alleged that Rosenblatt had disposed of his property to defraud his creditors, and was about to depart from the state, and obtained from the judge of the twelfth district court, an order for his arrest. The sheriff attempted to serve the order, but the chief of police refused to surrender the prisoner. On the 28th of January, the governor of the state issued a warrant for the extradition of Rosenblatt on a requisition of the governor of New York. On the same day Fleishacker applied to the Supreme Court for, and obtained, a writ of *habeas corpus* for the discharge of Rosenblatt, and in his application alleged that Rosenblatt's detention by the chief of police was illegal, because more than six days had expired since his arrest and he had not had an examination, and that his detention was also illegal because the sheriff was entitled to his custody by virtue

of the order of arrest in the civil suit, and that the chief of police was about to deliver him to the person who was authorized to carry him out of the state. The statute of California for the arrest of fugitives from justice provides that a person accused of treason, felony or other crime, who has fled from justice and is found in this state, must, on demand of the executive authority of the state from which he fled, be delivered up by the governor of this state to be removed to the state having jurisdiction of the offense. It then further provides that a magistrate may issue a warrant for the arrest of the alleged fugitive, and that, if it appears on examination, that the accused has committed the crime alleged, the magistrate must commit him for such time as he may deem reasonable to enable him to be arrested under the warrant of the executive of this state on a requisition of the executive of the state in which the offense was committed, unless he give bail. It is further provided, in section 861 of the Penal Code, under the general head of examination of defendants and holding them to answer, that the postponement of an examination cannot be for more than two days at a time, nor for more than six days in all, unless by consent or on motion of the defendant. When Rosenblatt was arrested, the requisition of the governor of New York had not arrived. The act concerning fugitives from justice (Penal Code, section 1550) provides that the proceedings for the arrest and commitment of fugitives are in all respects similar to those contained in the code for the arrest and commitment of persons charged with offenses committed in this state. The latter act permits magistrates to issue warrants for the arrest of fugitives before a requisition has arrived, upon affidavit that a crime has been committed.

Alexander Campbell, for the petitioner.

D. J. Murphy, against the discharge.

By THE COURT, MCKINSTRY, J. Under the constitution of the United States and the act of congress, a state is bound to surrender a fugitive for whom a proper requisition has been issued by the governor of the sister state. The act of the legislature was passed as auxiliary to the proceedings, under the constitution and act of congress, but is based solely on principles of comity; and the legislature had power to affix as many conditions as to the mode in which the preliminary arrest and examination should be conducted as the legislature deemed proper.

We are inclined to the belief that a person thus arrested, with a view to his being surrendered on requisition expected to arrive, is entitled to his discharge if his examination is not brought on before the magistrate within six days. The act of the legislature which authorized such preliminary arrest should be strictly complied with, but we do not think it necessary to decide that question in the present case.

This is not a case in which writs have been issued both from a state court and a United States court, where the officer of the state or federal court, as the case may be, first serving the writ is entitled to retain possession of the body.

We think, reference being had to the obligation imposed by the constitution of the United States, that the same rule is applicable to a proceeding under a requisition from the governor of another state as applies when the question is between a criminal proceeding initiated in this state and a civil action. In such case the interest of the private suitor who has caused a defendant to be arrested must yield to the paramount interest of the people of the state.

Ordered that H. H. Ellis, chief of police of the city and county of San Francisco, state of California, be, and he is hereby authorized to serve the warrant of arrest issued by the governor of the state of California, upon the requisition of the governor of the state of New York, for the surrender and delivery of Rosenblatt, and to deliver said Rosenblatt to Richard O'Connor, agent of the state of New York; and the sheriff of said city and county is hereby authorized and directed to surrender and deliver the body of said Samson Rosenblatt into the custody of said H. H. Ellis, chief of police as aforesaid, for the purposes aforesaid.

EX PARTE JILZ.

(64 Mo., 205.)

HABEAS CORPUS: *Res adjudicata.*

Where a person confined by virtue of a sentence upon conviction for crime is discharged from such confinement on *habeas corpus*, by a judge having jurisdiction to determine the matter, on the ground of the alleged illegality of the sentence, the discharge being a judgment in favor of personal liberty, is final and conclusive.

In such a case the Supreme Court has no jurisdiction to re-examine the grounds on which a discharge was granted, and if the defendant is again arrested on the same conviction, the Supreme Court will release him on *habeas corpus*, on the ground that his right to be set at liberty under that conviction is *res adjudicata*.

NORTON, J. The petitioner, on the 12th of August, 1876, was tried in the St. Louis court of criminal correction and was convicted of criminal abortion, and was sentenced by said court to imprisonment in the St. Louis county jail for the term of one year and to the payment of a fine of \$500. Under said sentence he was committed to the jail of said county, and there remained until the 22d day of August, 1876, when he applied to James J. Lindley, a judge of the circuit court of St. Louis county, for a writ of *habeas corpus*, which was by said judge issued, and on a hearing of the same, the said Jilz was discharged from his said imprisonment on the same day, on the ground that the court of criminal correction had exceeded its power in sentencing him, Jilz, to confinement in the county jail of St. Louis county for one year, and that the sentence under it and the commitment were void. After said Jilz was thus discharged, he was again, on the 29th day of September, 1876, recommitted to the jail of St. Louis county on a re-issue of the same commitment upon which he was originally imprisoned, and from which he had been discharged by Judge Lindley.

Petitioner Jilz now seeks to be discharged from this last imprisonment on the following grounds:

1st. Because the judgment and sentence of said court of criminal correction was void, in this, that under the law applicable to St. Louis county, said court only had jurisdiction to sentence him to an imprisonment for the period of six months in the city work-house of the city of St. Louis.

2d. Because having been once discharged on *habeas corpus* by Judge Lindley, who had power to hear and determine the legality of his imprisonment, his re-arrest and re-imprisonment on the re-issue of the same commitment were illegal and void.

If the second reason assigned by petitioner for his discharge be well founded, it will dispense with a consideration of the first. Our attention will, therefore, be directed to it.

It is not denied but that Judge Lindley had the legal right to issue the writ of *habeas corpus* which was issued by him on the 26th day of August, 1876. If the circuit judge had power to

issue the writ—which is conceded—such judge acquired jurisdiction over the subject matter, when the office of the writ had been partially performed, in bringing before him the prisoner with the cause of his detention and imprisonment.

In the case of *Martin v. The State* (12 Mo., 474), where one Jackson was imprisoned by virtue of an indictment found in the criminal court of St. Louis county, and not having been brought to trial at the end of the second term after the indictment was found, he was discharged on *habeas corpus* by a judge of the circuit court of St. Louis county from his imprisonment. Martin, the jailor, having him in custody, was ordered by the criminal court to retain Jackson in custody to answer the indictment, but disregarded the order of the criminal court and discharged Jackson in obedience to the order of the circuit judge. Martin was fined for contempt in disobeying the order of the criminal court, and appealed to this court from the judgment imposing the fine. In the disposition of the case it became necessary to consider the action of the circuit judge in discharging Martin, and Judge Ryland, speaking for the court, observed: "The St. Louis circuit court, and the judge thereof in vacation, had the power to grant and issue the writ. This gives to such court or judge jurisdiction over the matter; and though the statute expressly declares that no person imprisoned on an indictment found in any court of competent jurisdiction, or by virtue of any process or commitment to enforce such indictment, can be discharged under the provisions of this act, but may be let to bail if the offense is bailable, and if the offense be not bailable, he shall be remanded forthwith; yet this section does not take away the jurisdiction, but orders and directs what shall be done. A circuit judge, therefore, discharging against this provision of the statute, may be considered as acting indiscreetly, even erroneously. Yet having jurisdiction over the subject, his order discharging must be considered as justification to the jailor in turning out the prisoner. * * * * The circuit judge having authority to issue the writ of *habeas corpus* (and this point the attorney for the state in his brief admits, but contends that all the subsequent acts of the judge are not only against but beyond his jurisdiction, and are utterly void), his act afterwards in discharging Jackson, the prisoner, although it may have been erroneous and contrary to law, yet it could not be said to be an act *coram non judice*."

So, also, in the case of *Ex parte Page* (49 Mo., 291), it was held by this court "that Page, who had been convicted of grand larceny and sentenced to the penitentiary for ten years, was entitled to his discharge on proceeding by *habeas corpus*, on the ground that the judgment of the court sentencing him to ten years was void, because the highest punishment under the law was seven years for such offense."

Judge Lindley, of the circuit court, having thus acquired jurisdiction of the person and subject matter, was authorized and required to determine the question as to the legality of the imprisonment, and whether he decided erroneously or not, is immaterial, the discharge of the prisoner being in favor of personal liberty, is final and conclusive. In proceedings by *habeas corpus*, this court only exercises original jurisdiction, and in issuing the writ and determining the questions arising under it, possesses no more power than is possessed by a circuit or county court, or any judge or officer authorized by law to issue the writ and authorized to remand, admit to bail, or discharge the prisoner according to the circumstances of the case.

In the case of *Howe v. The State* (9 Mo., 690), it was held that an appeal from a judgment of the circuit court, refusing to discharge a prisoner on *habeas corpus*, would not lie to this court.

In the case of *Ex parte Long* (11 Mo., 662), it was also held that, "in deciding on the propriety of discharging a prisoner on *habeas corpus*, this court exercises no appellate jurisdiction."

It would seem, therefore, that if a judgment of a circuit court refusing to discharge a prisoner, was conclusive, or not subject to be reviewed on appeal, a judgment of a court or judge, discharging a prisoner, ought in like manner to be conclusive, especially when the statute expressly provides that "no person who has been discharged by the order of any court or magistrate upon a writ of *habeas corpus*, issued pursuant to this chapter, shall be again imprisoned, restrained, and kept in custody for the same cause," etc. (Gen. St., 629, sec. 55.)

The case of *Yates* (4 Johns., 318), is very analogous in some of its features to the case at bar, and the questions involved were most ably and thoroughly discussed. Yates was committed to jail by a court of chancery for contempt of court. He applied to Justice Spencer for a writ of *habeas corpus*, and was by him discharged. After he was discharged the court of chancery ordered his arrest and imprisonment on the same charge. He

applic
was ag
arreste
the sa
Supre
grante
custod
heard
The d
the co
delive
consid
1st.
2d.
re-im
In
certai
a com
a con
by le
offens
habea
ment,
every
to re
habea
in a r
if he
not b
and s
voida
whet
charg
He
obser
Yorl
larg
same
wher
havi
T

applied to Justice Spencer again for a writ of *habeas corpus*, and was again by him discharged. After this discharge he was again arrested and imprisoned on the order of the chancery court on the same charge. An application was subsequently made to the Supreme Court by Yates for a writ of *habeas corpus*, which was granted, and after a full hearing the prisoner was remanded to custody. He then sued out a writ of error, and the case was heard by the court of errors, and is reported in 6 Johns., 337. The decision of the Supreme Court, in 4 Johns., was reversed by the court of errors, and the prisoner discharged. Clinton, who delivered the opinion, concurred in by a majority of the court, considered the following points with others:

1st. Whether a judge in vacation had jurisdiction in the case?

2d. Whether a person discharged on a *habeas corpus* can be re-imprisoned for the same offense?

In passing upon the two points, he observes: "A judge is certainly constituted a tribunal to pronounce upon the legality of a commitment. He is not to intermeddle when the prisoner is a convict or in execution by legal process—when he is detained by legal processes—out of criminal courts for some matter or offense not bailable. If a prisoner is brought before a judge in *habeas corpus*, who is to determine on the legality of a commitment, is he to take it for granted that every commitment of every court and magistrate for offenses not bailable is legal, and to remand the prisoner accordingly? Will not this render the *habeas corpus* act of little value, and circumscribe its operation in a most pernicious manner? The judge has jurisdiction, and, if he has jurisdiction, his judgment may be erroneous, but it cannot be void. If he decides that the process is illegal, he may err, and so may all courts, but erroneous judgments are not void but voidable. If, then, the judge had jurisdiction in the cause, whether he decided erroneously or not, is immaterial; his discharge being in favor of personal liberty is final and conclusive. He is, in that respect, a court of *dernier resort*." He also observes, in speaking of the provision of the statute of New York, similar to our own, "that no person who shall be set at large upon any *habeas corpus*, shall again be imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause."

This provision appears to set this branch of the inquiry at

rest. It is the same as in the English statute, and evidently refers, when speaking of the court where the prisoner is bound to appear, or a court having jurisdiction of the cause, to the case of persons bound to appear and answer for crimes in criminal courts. If the right of the imprisonment is sustained in other cases, the benefits of the writ of *habeas corpus* may be greatly evaded if not completely nullified. I consider it, therefore, of great importance to personal liberty to resist this extraordinary doctrine. Abuses may indeed occur in the exercise of the powers of a judge under the *habeas corpus* act, but if he errs in favor of personal liberty, he errs on the safe side, and his decision ought not to be called in question. That any re-commitment in this case is illegal, I think cannot be doubted. The prisoner was discharged from custody, and the judgment of the Supreme Court remanding him to imprisonment was reversed by the court of errors.

The conclusion arrived at in the case of Yates, was reached after a most thorough and searching investigation by some of the ablest and most learned judges of that day, and commends itself to our favorable consideration as being in consonance with the justice of the case and sound logic. In the light, therefore, of the cases above cited, as well as the provisions of our statute regulating proceedings of this character, and expressly prohibiting the re-arrest and re-commitment of a prisoner after being discharged by a court or officer having jurisdiction of the person, and authority to act in regard to the subject matter, the re-arrest and re-commitment of Jilz by the St. Louis court of criminal correction was unauthorized, and his imprisonment thereunder illegal. It is no argument against this conclusion to say that a judge or officer authorized to issue this writ of right may commit a mistake and release from confinement a citizen who ought not to be released. Under any system of jurisprudence, no matter how perfect and complete it may be, mistakes will sometimes be made, and errors committed. Questions of law or fact, whether the determination of them be confided to the court or jury, owing to the imperfections incident to all human reasoning, are often improperly and erroneously determined, yet when they are determined by those who are by law intrusted with their determination, that is an end of the matter. If, even, as in this case, a person convicted of a misdemeanor, brutal in its character, and which shocks the moral sense of the whole community,

should be entitled to his discharge by reason of any error committed, it is better that it should be so than that a principle should be recognized or a rule laid down which would practically render the writ of *habeas corpus* a nullity, and bring into constant danger and peril the liberty of the citizen. We deem it unnecessary, for the purpose of this case, to enter into a consideration of the question whether the act requiring the St. Louis court of criminal correction to sentence persons, who are convicted of misdemeanors in St. Louis county, to the work-house of the city of St. Louis for the period of six months, is or is not obnoxious to the constitution, on the ground of its being a partial or local and not a general law. Upon this point we express no opinion, nor is it necessary to do so.

It is argued that, inasmuch as Jilz, on the 19th day of August, 1876, took his appeal to the St. Louis court of appeals from the judgment of the St. Louis court of criminal correction, the constitution, in providing that no appeal in such cases from the judgment which the St. Louis court of appeals might render should be allowed, deprives this court of its original jurisdiction to issue writs of *habeas corpus*, and to hear and determine the same.

If, in issuing writs of *habeas corpus*, and in determining the questions arising thereunder, this court could exercise appellate jurisdiction, there might be some ground for the proposition contended for. It has, however, been expressly decided in the cases herein cited, that in a proceeding of this character this court cannot exercise any appellate jurisdiction whatever. It therefore necessarily follows that the prohibition of an appeal from any decision which might be rendered by the St. Louis court of appeals does not prohibit this court from the exercise of a jurisdiction bestowed by the constitution in the exercise of which (as in *habeas corpus*) it does not act as an appellate court. For the reasons expressed herein, we think the prisoner is entitled to a discharge from the imprisonment of which he complains, and with the concurrence of the other judges will be so ordered.

Per HENRY, J., concurring. I fully and heartily concur in the foregoing able opinion, and hold that the judgment of Judge Lindley, discharging Jilz from the custody of the jailor, was final and conclusive, and that neither the court of criminal cor-

rection, nor any other court in the state could re-commit him on the original sentence.

The position of the counsel for the state, and the ground necessarily taken by any one holding that the action of the court of criminal correction was proper, is that, although the statute authorized Judge Lindley to issue the writ, and when Jilz was brought before him, he acquired jurisdiction of his person and of the cause, yet he had no jurisdiction to discharge him, unless he should decide properly the legal questions involved. In other words, if the sentence pronounced by the court of criminal correction was right, Judge Lindley had jurisdiction to commit, but none to discharge Jilz, and Judge Cady had the right, and it became his duty to disregard the order of discharge and re-commit him.

In the matter of *Da Costa* (Park. Crim. Cas., 129) it was held by the Supreme Court of New York, that "the principle of *res adjudicata* is applicable to proceedings upon *habeas corpus*." That was a case in which the petitioners had been remanded to the custody of the person who held them, but the principle of that is none the less applicable to this case. Our statute gives the prisoner this writ as often as he may find a court or officer superior to the one to whom he last made his application, authorized to issue it. In his petition he is required to state, "that no application for the relief sought has been made to or refused by any court, officer or officers superior to the one to whom the petition is presented."

In the case of *Da Costa*, *supra*, the observation of Senator Paige is quoted and approved, that "if a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata* the consequence will be lamentable. This favored writ will become an engine of oppression instead of a writ of liberty."

In the same case (*Mercieu v. People, ex rel. Burney*, 25 Wend., 64) the chancellor delivering the opinion also held that "the principle of *res adjudicata* was applicable to a proceeding upon *habeas corpus*."

Neither the court of appeals nor the Supreme Court exercises appellate jurisdiction when it issues this writ, and its judgment, in this proceeding, is of no more force or validity than that of a justice of the county court, or a circuit judge.

In *ex parte Toney* (11 Mo. 662), Judge Napton observed that, "in deciding on the propriety of discharging a prisoner on

habeas corpus
the court
which
exercise
by the
carder
court
court
the court
son, and
they
resort
set as
held

The
discharge
the prisoner
there
and so
this case
have
the court
court
ous, y
passing
charge
office
judgment

If
indorse
his writ
charge
ment
discharge
we n
correc
for be
writ
judic
the st
recov

habeas corpus this court exercises no appellate jurisdiction. In the exercise of this power it is confined within the same limits which would restrain a judge of the circuit or county court in its exercise. It can give no other or greater relief than is afforded by these officers. If the idea of all appellate jurisdiction is discarded, it will be obvious that neither this court, nor any other court or officer, can investigate the legality of a judgment of a court of competent jurisdiction by a writ of *habeas corpus*. If the court has jurisdiction of the subject matter and of the person, although its proceedings may be irregular or erroneous, yet they cannot be set aside in this proceeding. The party must resort to his writ of error, or other direct remedy, to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive."

The court held in that case that Toney was not entitled to his discharge, and remanded him to the custody of the warden of the penitentiary; but, suppose it had determined otherwise, was there any authority in the court, in which Toney was convicted and sentenced, to re-commit him, in defiance of the mandate of this court, whether it erred or not? Could the inferior court have reviewed and reversed the judgment of the court? When the court says: "Although its proceedings (proceedings of the court in which the conviction was had) may be irregular or erroneous, yet they cannot be set aside in this proceeding, it was not passing upon the effect of a judgment upon a *habeas corpus* discharging the prisoner, but announcing a rule by which courts, or officers issuing the writ, should be guided in determining what judgment to render.

If the doctrine of the Toney case be correct, and we fully indorse it, the court of criminal correction, if Jilz had sued out his writ in this court instead of the circuit court, and been discharged, could have re-committed him, and repeated the commitment as often as any court should, on *habeas corpus*, order his discharge, unless such order regularly issued, were a finality. If we now discharge Jilz, what is to hinder the court of criminal correction from re-committing him, if the doctrine contended for be the law? And if this be the law, of what value is the writ of *habeas corpus*? The judge of the court, acting in a judicial capacity, would not be liable to the penalty prescribed by the statute, and if he were, what is the penalty, a hundred times recovered, in comparison of the personal liberty of a citizen?

But, it may be said, a county court justice may issue the writ and discharge one convicted of a felony, and sentenced to the penitentiary by a circuit court. If this be so, the mistake was in authorizing such inferior courts to issue this writ, but far better were it that nine hundred and ninety-nine of every thousand guilty men should escape under this process, than that a writ, which in the past has accomplished so much for personal liberty, should be rendered inefficacious by judicial construction or legislative enactment.

It is the most celebrated writ known to our law, and has received such encomiums as have been pronounced upon no other judicial process belonging to ours or any other system of jurisprudence. Its origin is so far back in antiquity that its date cannot now be ascertained. It is older than *Magna Charta*, and for centuries has been held by Englishmen as the bulwark of their liberty, and is so highly esteemed by the people of the United States, that it has been embalmed in the federal constitution and in the constitution of every state in the Union; and yet if the position of the counsel for the state be correct, it is of less value than a writ of replevin, or a *feri facias*, for these do what they are designed to accomplish, while an inferior court can set at naught the judgment of the highest judicial tribunal of the land discharging one restrained of his liberty, and the victim of judicial oppression has no remedy but to resort again to his *habeas corpus*, again to be committed if such inferior court decree, or feign to believe, the judgment discharging him erroneous. With what propriety could it be denominated "the great writ of liberty," if this be the law? When, then, would a citizen, illegally restrained of his liberty, get his final discharge on a *habeas corpus*?

This is no time to impair the efficacy of this writ. Now, more than ever before, should we be careful to preserve "this dearest birthright of Britons," as, more than a century ago, it was characterized by the English colonists in America. No prison walls should be strong enough, against its mandate, to hold one for whom it issues, nor any judge or court too great to bow in submission to the judgment rendered in the proceeding by a tribunal authorized to issue the writ of *habeas corpus*.

I think that the prisoner is entitled to his discharge.

NOTE.—How far a decision on a hearing on a writ of *habeas corpus* is to be regarded as *res adjudicata* is a subject that has been much discussed, and on

which
that "I
final ju
would
was det
See, on
of erro
prison.
of excl
on habe
Queen'
had re
the rig
ment, d
"The
bar to a
may pu
judicia
Ring, 2
writ of
People,
Serg. a
680, no
883; *H*
Mitchel
slave fl
was fro
out wh
decisio
avail h
In *M*
had en
afterwa
in the
enlistm
ground
McGeh
case it
New Y
a final
it. Se
113.

which the authorities are by no means uniform. It is laid down by Hurd that "it has never been decided in England that a writ of error will lie to a final judgment made on *habeas corpus*. But it has repeatedly been said that it would not." (*Hurd on Habeas Corpus*, marg. p. 562.) The ground on which it was denied that a writ of error would lie is that the adjudication was not final. See, on this point, *Yates v. People*, 6 Johns, 420, where it was held that a writ of error would lie to a judgment *against* the prisoner remanding him to prison. In *Ex parte Pennington*, 13 Meeson and Welsby, p. 678, the court of exchequer re-examined the question of the petitioner's right to a discharge on *habeas corpus*, although the case had already been before the court of Queen's Bench and before the lord chief baron at chambers, both of whom had refused a discharge, the court saying: "The defendant, however, has the right to the opinion of every court as to the propriety of his imprisonment, etc." In California the same doctrine is held, the court saying that, "The statute never contemplated that a judgment on one writ should be a bar to any further proceeding, but looks to a different result, and any prisoner may pursue his remedy of *habeas corpus* until he has exhausted the whole judicial power of the statute." *In re Perkins*, 2 Cal., 424; see also *In re Ring*, 28 Cal., 247. That a writ of error will not lie to an adjudication on a writ of *habeas corpus* because the judgment is not final, see *Hammond v. People*, 32 Ill., 446; *Russell v. Com.*, Penrose and Watts, 83; *Com. v. Jones*, 3 Serg. and Rawle, 158; *Bell v. State*, 4 Gill., 301; *Jones v. Timberlake*, 6 Rand., 680, note; *Wade v. Judge*, 3 Ala., 130; *Steal v. Shirley*, 9 Smedes and Marsh., 383; *Holt v. State*, 9 Mo., 690; *Weddington v. Sloan*, 15 B. Mon., 147; *Ex parte Mitchell*, 1 La. Ann., 413. In *Marvin v. Kirby*, 12 B. Mon., 542, where a slave filed a bill in chancery against her mistress to obtain a decree that she was free, relying on a decision on a writ of *habeas corpus* which she had sued out when traveling in Pennsylvania with her mistress, it was held that the decision on the writ in Pennsylvania was not *res adjudicata* and could not avail her.

In *McConologue's Case*, 107 Mass., 154, where it appeared that a minor who had enlisted in the army had been once discharged on *habeas corpus*, and had afterwards been retaken by the military officer, it was held that a judgment in the minor's favor on the first writ was conclusive as to the illegality of his enlistment, and that he was entitled to his discharge on a second writ, on the ground that the matters involved were *res adjudicata*. And in *Ex parte McGehan*, 22 Ohio St., 442, a similar doctrine is announced, although in that case it is but *dictum*, the facts not calling for the application of the rule. In New York it appears that a judgment on a writ of *habeas corpus* is considered a final judgment, and that a writ of error of *certiorari* will lie to review it. See *People v. Cavenagh*, 2 Park. Cr., 650; *People v. Burtnett*, 5 Park. Cr., 113.

IN RE SNYDER.

(17 Kan., 542.)

HABEAS CORPUS: *False pretenses—Evidence—Delusive promise.*

Under section 677 of the code, Gen. Stat. 1868, p. 763, the judge or court issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, even in case there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal.

On the hearing and determination of a cause arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property.

It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor need the pretenses be the paramount cause of the delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with the property.

A pretense which is false when made, but true by the act of the person making the same when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute.

To hold a person for trial who is charged with obtaining money or property by false pretenses, it must appear that the pretenses relied upon relate to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.

Original proceeding in *habeas corpus*.

Petition filed in this court on the 2d day of January, 1877, on behalf of A. J. Snyder, for a writ of *habeas corpus*. The petitioner sets forth the following facts:

"That A. J. Snyder was illegally restrained of his liberty in the county jail at Mound City, the county seat of Linn county, by D. R. Lamoreau, as sheriff of said county; that said D. R. Lamoreau pretends to restrain said A. J. Snyder of his liberty by virtue of some pretended proof, the precise nature of which is unknown to your petitioner, the justice before whom he was examined not having reduced such testimony to writing. Your petitioner further represents unto your honorable court that such illegal restraint consists in the following: that on the 1st day of

December, 1876, said A. J. Snyder was arrested upon the charge of obtaining money under false pretenses, and taken before one A. D. Hyatt, a justice of the peace in and for Linn county, for preliminary examination; that upon such examination there was no evidence offered which showed or tended to show in any manner that an offense had been committed against or under the laws of the state of Kansas, nor was there any evidence offered which showed or in any manner tended to show that there was any probable cause for believing that said A. J. Snyder had been guilty of any offense whatever under the laws of the state of Kansas. Yet, notwithstanding the premises, the said justice of the peace refused to discharge the said A. J. Snyder or to admit him to bail, as under the laws of the state of Kansas he was required to do."

The petition further alleged that the order or warrant of commitment under which Snyder was held in custody was illegal and insufficient in law. It also states that the reason the application was not made to the probate judge of Linn county, was, "that such probate judge is disqualified from hearing the same by reason of being an attorney-of-record in a civil suit involving the same transaction." And the petition further alleges "that an application was made to the Hon. W. C. Stewart, judge of the 6th judicial district, in which Linn county is, for a writ of *habeas corpus*, and that said application was refused." The usual prayer for the issuance of the writ was also annexed thereto. Upon such petition the writ of *habeas corpus* was issued by the court, and was duly served upon the said Lamoreau, sheriff, to which a return was made by said sheriff, in effect that "he had the body of said Snyder before the court." And for the authority and cause of the restraint of the said Snyder in his custody he stated that—

"On December 1st, 1876, John Hood made, in writing and upon oath, a complaint before A. D. Hyatt, a justice of the peace of Linn county, against the said A. J. Snyder, charging him with having, on November 25th, 1876, procured \$1,500 in money and a check drawn by Snyder & Co., on Hood & Kincaids, in favor of Snyder & Co., for the sum of \$1,500, upon which check the said John Hood wrote across the face, "The First National Bank of Kansas city, Missouri, will please pay,—Hood & Kincaids," from the firm of Hood & Kincaids by false pretenses and with intent to defraud Hood & Kincaids; that on said December 1st

said justice of the peace issued a warrant, reciting fully the alleged offense; that Snyder was arrested; that upon the preliminary examination numerous witnesses (giving their names), testified; that the evidence taken at the examination was not reduced to writing; that upon the conclusion of the examination the justice decided an offense had been committed, and that there was probable cause to believe said Snyder guilty as charged in the complaint and warrant, and ordered that he give bail in the sum of \$5,000 for his appearance at the district court of said Linn county, at the next term thereof, to answer said charge, and in default of such bail to be committed to the jail of the county of Linn; that no bail whatever was offered; that said justice of the peace then made out a written order of commitment, and gave the same to the respondent to execute; that said respondent was and is the sheriff of said Linn county, and held said Snyder in his custody as such sheriff by virtue of said order of commitment."

Copies of the complaint, warrant, and decision of the justice, are attached to the return. The original order of commitment was also produced by the sheriff on the hearing. A reply was filed to the return of the officer, stating that the testimony mentioned in the return, and the evidence given by the witnesses named, were not sufficient to authorize the magistrate to find Snyder probably guilty of the offense charged. Afterwards, under the requirements of the court, an amended reply was filed, setting forth in detail the evidence of the prosecution before the justice.

The case was set for hearing, and was heard, on the 30th of January, 1877. On the hearing, the question as to bail and the illegality and insufficiency of the warrant of commitment were waived, and the only allegation relied on by Snyder was the one contained in the petition concerning the "alleged want of probable cause." The counsel for the respondent admitted that the testimony contained in the reply set forth all the evidence admitted before the justice, excepting that purporting to have been given by John Hood, one of the witnesses for the prosecution and a member of the firm of Hood & Kineaid. The court summoned John Hood as a witness and received his evidence orally.

Upon an investigation of the criminal charge preferred against Snyder before the justice, the facts of the case were found to be substantially as follows:

During the fall of 1876, A. J. Snyder was engaged in buying and shipping stock under the name of Snyder & Co., and had made several shipments of stock from points along the Missouri river, Fort Scott & Gulf railroad, to D. A. Painter & Son, who were live stock brokers and commission merchants at Kansas City, Missouri. One J. M. Shores was connected with Snyder in business. Hood & Kincaids were brokers, having a banking house at Pleasanton, Linn county, Kansas, of which Mr. Hood was cashier and general manager. The firm of D. A. Painter & Son was composed of D. A. Painter and Charles Painter. On the 22d day of November, 1876, Snyder went to Charles Painter, the bookkeeper of Painter & Son, for a letter of credit, took it to the Martin bank, had it indorsed by the teller, returned to his office, and delivered the letter of credit to Snyder. Snyder looked it over and remarked that he thought there would be bother about it on account of the words "bill of lading attached." At his request, Charles Painter wrote out another letter of credit, of which the following is a copy:

"KANSAS CITY, Mo., Nov. 22, 1876.

"*Messrs. Hood & Kincaids, Pleasanton, Kansas:*

"Dear Sirs: We will honor Messrs. A. J. Snyder & Co.'s draft on us to the amount of four thousand dollars (\$4,000), to pay on live stock consigned to us.

"Very truly yours,

D. A. PAINTER & SON."

Snyder took this letter also, remarking that if he couldn't use the one he would use the other. Snyder then went to Pleasanton, and on the 23d he called at the banking house of Hood & Kincaids, and presented the above letter of credit and said he wanted to get money to buy stock with. Hood asked him what amount of currency he wanted; he answered about \$2,000. Hood told him they were short in currency, but should send up to Kansas City and have some shipped down, but that they could not see to the shipping of stock. In this conversation Snyder told Hood the cattle would be shipped to Painter & Son. Snyder then telegraphed to Painter & Son, that

"Your letter of credit says, on stock consigned to us. Hood & Kincaids can't go and see how consigned. Telegraph to H. & K. to erase that part. We will want some money to-morrow.

"SNYDER & Co."

On the same day Painter & Son, in answer to the said dispatch, telegraphed to Hood & Kineaid: "We will honor Snyder & Co.'s drafts, *to pay on stock*, to the amount of four thousand dollars." On the 23d, or the 24th (the witness Hood fixes the 24th as the date), Snyder again called at the bank and asked Hood what was the matter with the telegram—and then stated he had been to Fort Scott to get money on his draft on Painter & Son, and that the bank there had telegraphed to H. & K., and H. & K. had answered they would honor the draft on certain conditions, that he had bought the pick of a large lot of cattle, and wanted money to pay for them. Hood thinks he said about one hundred head. Snyder then stated he would send to Painter & Son and have the letter of credit modified. After this conversation, Snyder took the cars and went to Fort Scott. On the 24th, late in the afternoon, he drove out to D. G. Glascock's, in Vernon county, Mo., nine miles northeast from Fort Scott and sixteen miles from Prescott (Prescott is on the railroad, six miles south of Pleasanton). On the morning of the 25th Snyder and Glascock went out and looked at the cattle Glascock was fattening, and Snyder made a bargain for the cattle, by the terms of which he was to take eighty head of steers at 34 cents per pound, 37 or 38 of them to be delivered on the next Monday, the 27th, and the balance about the middle of February. Snyder paid Glascock \$25 on the cattle and took his receipt therefor. Glascock also sold him his hogs, twelve or fifteen in number, and agreed to try and get up a carload. Snyder then returned to Pleasanton, and on the same day telegraphed to Painter & Son:

"The words *to pay on stock* in the way. Say to Hood you will, or will not, pay. Answer quick.

"SNYDER & Co."

Painter & Son telegraphed back to Hood & Kineaid, "We will honor Snyder & Co.'s drafts to the amount of four thousand dollars." This telegram was received by Hood before Snyder called at the bank on the 25th. About noon on the 25th Snyder went to the bank and asked Hood how it was "in regard to that money to-day." Hood told him that he thought everything was right now, and asked him how much money he would need. He said he thought that \$3,000 would do. Snyder made draft for the amount on D. A. Painter & Son, and Hood paid him \$1,500 in currency, and a certified check on the First National Bank at

Kansas City for \$1,500. Hood said to him at the time that he supposed the cattle would be shipped on Monday night. Snyder said no, that it would take a couple of days to get them to the station, that they were about nine miles northeast of Fort Scott and sixteen miles from Prescott. Hood remarked to him that he ought to get them to Fort Scott in less time than that; Snyder said the cattle were to be delivered and paid for at Young's scales, that Young's scales were nearer on the road to Prescott, and that the cattle were fat and would have to be driven slow. This conversation between Hood and Snyder occurred while Hood was certifying to the check. Snyder first drew a draft for \$3,000, but its terms being unsatisfactory to Hood in not being payable at sight, Hood made one out, inserting therein, "Pay to the order, at sight, of Hood & Kincaids," etc., and Snyder signed the firm name of "Snyder & Co." thereto. Hood testified he believed all the representations made to him by Snyder to be true, and that he was induced to deliver to Snyder the \$1,500 in currency, and the certified check of \$1,500, on November 25th, upon Snyder's statement that he had enough cattle bought, and that he would ship them to Painter & Son, and believing that Painter & Son would pay this draft when the cattle were disposed of, if not before; and further, that he would pay H. & K. twenty-five cents on the \$100 for exchange. Hood also testified that, at the time he delivered the money and certified check to Snyder, he did not know the financial condition of D. A. Painter & Son, and that he did not have at the time such confidence in Painter & Son as to have advanced the money obtained on their credit alone; that he had confidence in their integrity, not in their financial ability, and his confidence in their integrity was based upon representations that had been made to him by different parties that they were respectable dealers. Snyder returned to Fort Scott. On Sunday, Snyder and Shores together went again to Glasscock's house, and called him out to the fence. Shores said, "Mr. Glasscock, we've come to see if we couldn't get you to hold these cattle another day. Our financial matters is so we can't pay for 'em to-morrow, and if it would suit you as well, we'd like for you to hold 'em another day." Glasscock rather objected to this. Then Shores said, in the presence of Snyder, "If you would rather do it, we'll have to get you to ship the cattle in your own name." Glasscock then consented to keep the cattle another

day. Snyder then went to Fort Scott and engaged four cars of Ming, the agent of the Mo. R., Ft. Scott & Gulf railroad, to be used Tuesday night for Glascock's cattle, and others. On Monday he went to J. V. Morrison, a cattle shipper who shipped cattle over the M., K. & T. railway, told him he had bought Glascock's cattle, and made arrangements with him to have him ship the cattle in his own name to St. Louis; told him to order the cars and attend to the shipping of them, and also made arrangements with him to go out to Glascock's with him the next day. On Monday night, Snyder and Shores went to Glascock's house, stayed over night, and Tuesday, the 28th, in the morning, they went to "cut the cattle out." Snyder selected 38 to take, and then turned the rest back. Glascock examined the cattle turned back, and found Snyder had turned back many of the cattle he had agreed to take then, and in their place had selected cattle which were more profitable to feed. Glascock then insisted that if he took the cattle he had selected, he should secure him that he would take the balance. This Snyder would not do, saying that he wasn't prepared to leave the means. Glascock still insisted on security, and finally Snyder said: "If you can't do better than what you proposed, I'll have to let the trade fall back," and Snyder and Shores then drove off. The cattle selected would weigh about 1,100 pounds, and the 38 head selected, at 3½ cents, would amount to \$1,358.50. At the feed-gate they met Morrison, and told him that the trade was "busted up;" wanted him "to go and buy the cattle, if he could—they would have nothing more to do with him." At Fort Scott Snyder saw Ming; "told him he could not ship and withdrew his order for cars." They then got on the freight train of which Charles Sykes was conductor, and left Fort Scott about 1.30 p. m. Snyder paid his fare, first to Prescott and then from Prescott to Pleasanton. The train stopped at Pleasanton about fifteen minutes. Snyder and Shores got out of the caboose. Snyder went to Hood & Kincaid's bank, and told Hood that he wanted some more money to finish paying for the stock he had bought; that he was in very much of a hurry; that there was a freight train at the depot ready to pull out, and that he wanted to get back to Prescott on it. Hood asked him how much more money he wanted. He said \$850, and gave a draft on D. A. Painter & Son for the \$850, in form similar to the \$3,000 draft, and Hood gave Snyder a certified check for the amount. Snyder

then
Plea
cabo
with
the
Nor
caids
to p
wen
wha
barg
with
then
and
and
abou
boug
ough
goin
men
for
Fric
selv
Jan
han
late
Rev
he
or
W
saic
tha
mo
of
a s
car
ing
tin
ab
of
ha

then tried to get on the pay car going north (Prescott is south of Pleasanton); could not get on it, and then got on to Sykes' caboose again, showed Sykes a large amount of money, rode with him to Kansas City. At nine o'clock on the 29th he got the \$850 check cashed at Wyandotte, at the banking-house of Northrup & Son. The \$3,000 draft in favor of Hood & Kincaids was sent to Kansas City, and Painter & Son being unable to pay the same, it was protested. On the 29th, D. A. Painter went to Wyandotte to see Snyder and Shores, and asked them what luck they had buying cattle. They stated that they had bargained for Glascock's cattle; that Glascock had disagreed with them about the selection of the cattle, and would not let them have the cattle. Painter said a \$3,000 draft had come on, and they had been forced to let it go to protest. Painter, Snyder and Shores then went to a saloon, where they had further talk about the \$3,000 draft. Painter insisted that if they hadn't bought any stock they must have the money; that the money ought to go to pay the draft. Snyder replied they were not going to commit themselves; that they were awaiting developments. Painter suggested that if they were keeping the money for what his firm were owing them, that he would pay them on Friday; they replied that they were not going to commit themselves. After Snyder was arrested on this charge, he said to one James Reynolds, "that they had put about \$3,000 in Painter's hands last spring, and he didn't like the way things were going lately; he said he hadn't lost anything, only \$700 or \$800." Reynolds also testified: "I can't say whether Snyder said that he had got even with him, and was going to keep even with him, or whether he said he had taken this plan to get even with him." While on his way back to Pleasanton, after his arrest, Snyder said to McGlothlin, the deputy sheriff who had him in charge, that Painter & Son owed him \$3,900; that he did this to get his money, or that it was the only way he had to get his money out of Painter & Son. While in the jail at Mound City, he made a similar statement to Robert Fleming. He also said he didn't care who H. & K. looked to for their money; that he was studying his own care. Painter & Son owed Snyder & Shores at this time from \$500 to \$700, and were able to pay that, but were not able to pay the \$3,850, without the cattle. They were persons of limited means. Neither Snyder, nor A. J. Snyder & Co., had any money on deposit with Hood & Kincaids at the time of

these transactions, and Hood & Kincaids have never been paid any part of \$3,850.

The foregoing statement of facts was prepared by the chief justice. Counsel appearing for Snyder in this court were *J. D. Snoddy, A. F. Ely* and *W. J. Buchan*. Counsel for respondent Lamoreaux, were *Stephen H. Allen* and *W. R. Biddle*. The case was argued orally by Messrs. *Snoddy* and *Ely* for petitioner, and Messrs. *Allen* and *Biddle* for respondent. An order for the release of the petitioner was made and issued on the 9th of February.

The opinion of the court was delivered by:

HORTON, C. J. The questions presented in the case for our consideration will be disposed of by us in the order in which they were raised. After the return of the sheriff had been made, and the reply thereto filed, the counsel for the respondent objected to the summoning of the prosecuting witness, and asked that the petitioner be remanded to the custody of the officer, as it appeared from the record that, upon complaint made that a criminal offense had been committed, a warrant describing the offense had been issued, the prisoner arrested, a preliminary examination duly had before the proper officer, and a finding made that the petitioner was guilty as charged in the complaint and warrant; that thereon bail had been fixed at \$5,000; that the petitioner had not offered any bail, and had been legally committed

Power of
court or
judge;
Practice.

for trial, and no question was made on account of any defect in the charge or process. Under § 671 of the Code, ch. 80, Gen. Stat., 763, it is expressly provided that no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him, when the term of commitment has not expired, when the party is in custody upon any process issued on any final judgment of a court of competent jurisdiction, or upon a warrant or commitment issued from the district court or any other court of competent jurisdiction, upon an indictment or information." An order of commitment to hold a prisoner for trial, issued by a magistrate before whom a person is brought for examination, upon a charge of having committed an offense, after such examination is concluded, and a finding made, that it appears that the prisoner is guilty as charged in the complaint and warrant, is not "a process issued on any final judgment of a court of competent jurisdiction;" nor is such a commitment

included in any process named in § 671 of the code. Hence, there is no prohibition in said section to prevent a court or judge from inquiring into the legality of the imprisonment of a person under a commitment of an examining magistrate.

Section 672 of the code (Gen. Stat. 1868, 763) provides: "No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in case not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases the court or judge shall summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper." Under this section, we hold that when a writ of *habeas corpus* issues on a complaint of illegal imprisonment, for alleged want of probable cause, the judge or court issuing the writ may, even in case where there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. This section gives a party committed for a crime by an examining magistrate an appeal from his commitment by virtue of the writ of *habeas corpus*: *The People v. Tompkins*, 1 Parker's (N. Y.) Crim. Rep., 224, 240. Upon this ground the court overruled the objection to the hearing of evidence in the case, and the motion to remand upon the record. But the court ordered, on its own motion, that the petitioner should amend his reply by setting out therein as fully and specifically as possible the testimony given by the various witnesses before the examining magistrate and named in the return of the sheriff. The better practice is, where a petition is presented for a writ of *habeas corpus*, for alleged want of probable cause, to embody in the petition all the testimony taken before the examining magistrate. When this evidence has been reduced to writing by the magistrate, or under his direction, a copy thereof should be obtained, with the certificate of the magistrate thereto. When such testimony is not reduced to writing, there usually is but little difficulty in setting out the material and important matters testified to.

Upon the hearing of the case on the merits, the petitioner objected to the witness John Hood testifying that he was induced to part with the \$1,500, and the certified check, on the statements and representations

False pretenses; belief of injured party; competency to testify.

of Snyder, on the ground that it was incompetent and was calling for the secret mental emotions of the witness. The objection was not well taken. This was a material fact to be established. It was proper for this court to know what influence the representations of Snyder had upon the witness. If they had none at all, the prosecution must have failed. "The fact was sought after, and not the opinion of the witness." *People v. Herrick*, 13 Wend., 87; *People v. Sully*, 5 Parker's (N. Y.) Cr. Rep., 142; *People v. Miller*, 2 Parker's (N. Y.) Cr. Rep., 197; *Thomas v. The People*, 34 N. Y., 351. Objections were also taken to Hood's testimony that he believed the representations made to him by Snyder on the 23d, 24th, 25th and 28th of November. The objections were overruled, and, for the reasons above stated, we think the evidence competent. It is indispensable to the consummation of the crime of obtaining money or property under false pretenses, that the person who has been induced to part with his money or property thereby must believe the pretense is true, and, confiding in its truth, must by reason of such confidence have been cheated and defrauded. We do not mean by this ruling that such evidence is the best, nor the most reliable; nor that it is necessary for the prosecutor to state he believed and relied upon the pretense. All of this may be inferred. We simply hold the evidence admissible.

The material question, however, in this case is, whether on the evidence submitted to us an offense is made out against Snyder for false pretense, within the statute, in his obtaining from Hood & Kincaids, on November 25th, the \$1,500 in currency and the certified check of \$1,500. The counsel for the petitioner contended that there was no evidence of the procuring of the money or check by any false pretense. *First*: Inasmuch as Hood, at the time he let Snyder have the money and check on the 25th of November, had an absolute order in the form of a telegram from Painter & Son to honor Snyder & Co.'s drafts for four thousand dollars, and had previously refused to pay the money on a letter of credit, which he construed as requiring him to see to the shipping of the stock to Painter & Son, it is conclusively shown that such telegraphic order of Painter & Son was the sole inducement by which the money and check were parted with by Hood. *Second*: That the representation made by Snyder to Hood that he had bought the pick of a large lot of cattle, about 100 head, was true on the

What constitutes false pretenses.

25th.
state
Kans
futu
tense
his c
parte
of th
to pa
part
100
ship
char
of th
and
the
were
deliv
mag
able
and
caus
Sny
had
Son
trial
goo
ind
whi
cau
mo
par
T
the
rep
pic
"h
rep
and
tim
coo

25th, when the money and check were obtained; and that the statement that the cattle would be shipped to Painter & Son at Kansas City was a representation or assurance in relation to a future transaction, and did not amount to a statutory false pretense. As to the first proposition of counsel of the petitioner for his discharge, we answer that we are not satisfied that Hood parted with the money and check solely on the telegram of credit of the 25th. The testimony tends to show that he was induced to part with the property in controversy partly on that telegram, partly on the representation of Snyder that he had bought about 100 head of cattle, and partly on the statement that he would ship the cattle to Painter & Son. In an examination of his character, we are not to pass absolutely on the guilt or innocence of the prisoner; if we shall find an offense has been committed, and there is probable cause to believe the prisoner guilty thereof, the prisoner should be committed for trial. As different motives were assigned by the prosecutor as operative in producing the delivery of the money and check to Snyder, the examining magistrate, and this court, are only to ascertain that there is probable cause to believe that the pretenses proved to have been false and fraudulent, if within the statute, were a part of the moving causes which induced Hood to part with the property, and that Snyder would not have obtained the same if the false pretenses had not been superadded to the telegraphic order of Painter & Son of November 25th, to authorize the holding of Snyder for trial. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; nor need the pretenses be the paramount cause of the delivery. It is sufficient if they are a part of the moving cause, and without them the prosecutor would not have parted with the property: *People v. Haynes*, 14 Wend., 547.

This leads us to examine the second proposition upon which the counsel for the petitioner claims his release, and to consider the representations made by Snyder, "that he had bought the pick of a large lot of cattle, about 100 head," and that "he would ship them to Painter & Son." The first representation was substantially true, when the money and check were obtained on the 25th of November. At that time the cattle had been contracted for by Snyder with Glasscock, and a part of the consideration paid. This representation,

What false
pretense is
not within
the statute.

when made on the 23d or 24th of November, was false. On the 25th, it had become true. Is a pretense which was false when made, within the statute, if true when the property is parted with? We think not. The pretense employed is only the means by which the offense is perpetrated. The substance of the offense consists in the obtaining of the property, and thereby with a fraudulent intent depriving the lawful owner of that which properly belongs to him. If a party by his own acts makes the false representations good, before obtaining the property, there is no consummation of the crime, and there is no criminal attempt, for it follows that, when there is a change of purpose on the part of a person seeking to obtain property by a false pretense, before any other wrongful act is committed than the making of the false pretense, the crime of the attempt is taken away. The fact that, in this case, Snyder never abandoned the scheme to defraud some one, does not militate against the conclusion, that the pretense must be false in fact when the property is parted with. How can it be said that Hood relied upon a false representation as to the purchase of the cattle when he delivered the money and check, if at that time the representation had become *true*? No property was parted with by Hood on the 23d or 24th. The representation then made by Snyder as to buying the cattle, was true, on the 25th, and before he obtained the money, or check; and if he is to be held for the commission of a crime by obtaining property under false pretenses, it must be upon some other representation than the representation on the 23d or 24th, as to having "bought the pick of a large lot of cattle."

As to the representation of Snyder, "that he would ship the cattle to Painter and Son, at Kansas City," we follow authority in holding such statement is not a statutory false pretense. The false pretenses relied upon to constitute an offense under the statute, must relate to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient: *Rex v. Young*, 3 Term R., 98; *Rex v. Lee*, L. and C., 309; *Commonwealth v. Drew*, 19 Rich., 179; *State v. Evers*, 49 Mo., 542; *Dillingham v. State*, 5 Ohio., 280; *Burrow v. State*, 12 Ark., 65; *State v. Magee*, 11 Ind., 154; *The State v. Green*, 7 Wis., 676. The representation that the cattle would be shipped to Painter & Son, related to an event which was thereafter to

happen. It was a promise or assurance of a future transaction. Upon the evidence we are, therefore, compelled to say, that as the only offense charged in the complaint, and in the warrant against Snyder, was the obtaining of the \$1,500 in currency and the certified check of \$1,500 on November 25th, as therein stated, and as the order of commitment was issued on the finding of the examining magistrate, that there was probable cause to believe Snyder "guilty as charged in the complaint and warrant," there is no legal authority for holding the petitioner in custody, and he must be discharged. It is, perhaps, unnecessary to add, that in point of moral turpitude, Snyder is as guilty in obtaining the property of Hood & Kincaids on the 25th of November on a false promise, if such be the fact, as if such pretense was within the statute. The criminal law, however, cannot reach the perpetrator of every fraud. "The statute may not regard mere naked lies as false pretenses." It has been well said: "The operation of the wisest law is imperfect and precarious; they seldom inspire virtue; they cannot always restrain vice; their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit." We have intentionally abstained from commenting upon the transactions of the 28th of November, when Snyder is alleged to have obtained a certified check of \$850, because there is nothing in the proceedings before the magistrate, or in this court, to prevent the petitioner from being arrested, if any complaint is made, therefore: Whether a crime has been committed in that regard, and whether there is probable cause to believe the petitioner guilty thereof, may be a matter of future examination and judicial determination. In this investigation, the testimony of facts, subsequent to the 25th, was received by us only to explain the transactions of the 25th of November, and to shed light upon the intent of Snyder.

That the force of this decision may not be misconstrued, we may properly say, that the evidence shows there was no collusion between the firm of Painter & Son and Snyder, and that the purchase of the cattle by Snyder of Glasscock on the morning of the 25th was made in good faith. It is evident, however, that Snyder never intended to ship any of the cattle to Painter & Son, and all his statements to that effect were in pursuance of his scheme to successfully carry out his fraudulent purpose.

Let the petitioner be discharged. All the justices concurring.

NOTE.—All of the authorities agree to the general doctrine, that an indictable false pretense must be as to some existing fact, and that a false pretense promissory in its nature cannot be the subject of a criminal charge. But the courts are somewhat divided in their application of this principle. This difference is sharply presented by the two cases of *Ranney v. People*, 23 N. Y., 418, and *Com. v. Parker*, Thach. (Mass.) Cr., 24. The facts in both cases were substantially the same. In each case the prosecutor was induced to pay the prisoner money, the prisoner promising to obtain the prosecutor a situation and alleging at the same time that he had a situation vacant, and in which he would put the prisoner. There was, in fact, no such situation vacant, and the prisoner did not obtain any situation for the prosecutor, and never intended to. The New York court held that there was no indictable false pretense, as the prosecutor relied upon the promise, the pretense as to an existing vacancy and the promise being inseparable. The Massachusetts court held that the pretense as to the existing vacancy was an indictable false pretense, although without the promise it would be of no legal importance. The Supreme Court of Michigan, in *Winslow v. People*, which will appear in 38 Mich., not yet out, hold with the Supreme Court of Massachusetts, disproving *Ranney v. People*.

PETITION OF SEMLER.

(41 Wis., 517.)

HABEAS CORPUS: *When writ denied—Not a substitute for appeal or writ of error—Case stated—Imprisonment in default of bail, on criminal charge: bail subsequently given on second complaint for same offense.*

Where the facts stated in a petition for a writ of *habeas corpus* and the papers thereto annexed, if established, will not warrant the discharge of the prisoner, the writ will be denied.

The writ of *habeas corpus* is not designed to perform the office of an appeal or writ of error; and cannot be resorted to for the purpose of reviewing orders or judgments which are merely erroneous, made or rendered by a court which had jurisdiction of the subject matter and of the person.

Thus, one who is imprisoned in default of bail, by order of a circuit court of this state, in which a criminal information is pending against him for embezzlement of moneys in his possession as county treasurer, will not be discharged by this court upon *habeas corpus*, on the ground that the information is insufficient to charge him with any offense, and that the circuit court erred in refusing to quash it for that reason.

Where the petitioner also alleges that, upon a complaint subsequently made before a magistrate, he was held to bail and gave the bail required, and that the offense thus complained of was the same as that described in the information previously filed, but this court, upon inspecting such complaint and other papers annexed, cannot assume that the offense charged is the same, it denies the writ, with a suggestion that the circuit court, on the prisoner's application for that purpose, should inquire into the fact, and, upon finding it to be as alleged, should grant the proper relief in respect to bail.

Application for a writ of *Habeas Corpus*.

This was an application to this court for a writ of *habeas corpus*, upon grounds which were thus stated by Mr. Justice Cole in his opinion herein as originally prepared :

"It appears from the petition, and the papers annexed, that the petitioner was arrested in August, 1876, on a complaint and warrant charging him with the crime of embezzling \$10,000 of the moneys of Washington county, on the first day of February, 1876, which moneys were then in his possession and intrusted to his care as treasurer of the county. The petitioner waived an examination before the magistrate, and, failing to give bail, was committed to the jail of the county. At the November term of the circuit court, 1876, an information was filed, containing three counts, in which the petitioner was charged with having embezzled \$10,000, moneys of the county, which he held as county treasurer. The cause was continued from the November term to the regular term in March following, and, for want of the required recognizance, the petitioner was remanded to the custody of the sheriff. At the next term of the court, the district attorney entered a *nolle* as to the third count in the information, and the court refused to quash the first and second counts on the motion of the petitioner. The petitioner was required to recognize in the sum of \$2,000 for his appearance, etc., and, in default of bail, was again, by an order entered April 9th, remanded to the custody of the sheriff until bail was given. It appears that the petitioner was, on the subsequent 11th day of April, taken from jail on a warrant and compelled by the sheriff to go before another justice of the peace to answer a complaint procured by the district attorney, charging him with embezzlement. An examination was waived on this charge, and the petitioner entered into a recognizance with sufficient sureties as required by the justice, and was discharged from further restraint in that matter. The sheriff then seized the petitioner and conveyed him to jail, where he remains, not having given bail according to the order of the circuit court. And the petitioner claims that his imprisonment is illegal, and, among other things, states that such illegality consists in this : that the first and second counts of the information do not charge him with any offense, and are void ; and that the order of the circuit court requiring him to give bail, and committing him in default thereof, is illegal and void."

For the petitioner, a brief was filed by *Frisby, Weil & Barney*,

and the cause was argued orally by *L. F. Frisby*. They contended,

1. That as the protection of the liberty of its citizens is one of the chief functions and highest prerogatives of the state, not only is the *habeas corpus* a prerogative writ, but an application for such writ is a "prerogative cause," and within the original jurisdiction of this court in *every* case where a citizen of this state is unlawfully imprisoned within the state. In reference to this point they cited and commented upon *Attorney-General v. Eau Claire*, 37 Wis., 400, 442-5; *Attorney-Gen. v. R. W. Companies*, 35 *Id.*, 512, 513, 517, 518; *Attorney-Gen. v. Blossom*, 1 *Id.*, 317-324, 327, 330; 3 *Id.*, 157, 175-6; *In re Stacy*, 10 Johns., 333; *In re Jackson*, 15 Mich., 423; *In re Spangler*, 11 *Id.*, 310; *People v. Martin*, 1 Park., 196; Bouv. Law Dic., "*Habeas Corpus*;" Hurd on H. C. (2d ed.), 144, 146.

2. That this court, on *habeas corpus*, could review the decision of the circuit court refusing to quash the information upon which the petitioner's imprisonment was founded, and could properly discharge him from such imprisonment, if it should find that the information did not charge him with any offense. In such a case, counsel argued at length, the circuit court could not properly be said to have ever acquired jurisdiction of the petitioner's person. A writ of *habeas corpus* is necessarily in the nature of a writ of error, operating as a review of the alleged illegalities in the proceedings brought up by it: Hurd on H. C. (2d ed.), 330-32, 350, 351, 380; *Burnham v. Morrissey*, 14 Gray, 226, 238; *Ex parte Yerger*, 8 Hall, 85-94; 32 Pa. St., 520. A court of appellate and supervisory jurisdiction may discharge a prisoner held on criminal process, where the commitment is voidable only: Hurd, 351, 352. In hearings under our statute (Tay. Stats., 1792, secs. 1, 4, 27), upon petition for a writ of *habeas corpus*, it would seem to be the duty of the court to inquire into the cause of the imprisonment, and, if it is found to be unlawful for any reason, to discharge the prisoner: *The People v. Martin*, 1 Park., 187, 191-7; 2 Kent, 28, 31; Hurd, 331-2.

3. That the second arrest of the petitioner, while in jail under the commitment of the circuit court, his being taken before the justice on a new complaint and warrant for the same cause, and being then admitted to bail for his appearance at the circuit court to answer the charge, rendered his continued imprisonment

upon the first warrant unlawful: Russell on Crimes, 421. The acts of the district attorney may operate as a waiver, like the acts of other public officers: 1 Wis., 414; 22 *Id.*, 69; 13 Iowa, 443.

The *Attorney-General*, *contra*, argued that this court ought not to take jurisdiction to issue the writ in this case; that in respect to this writ, as in respect to *mandamus*, injunction, etc., to warrant this court in assuming jurisdiction, the interest of the state should be primary and proximate, and the question at issue should affect the state at large, and not merely private or local rights (*Attorney-General v. Railway Co.'s*, 35 Wis., 425; *Attorney-General v. Eau Claire*, 37 *Id.*, 442; *State v. Wood*, 38 *Id.*, 71; *State v. Juneau Co., Id.*, 554; *Haben v. Board of Education*, 22 *Id.*, 101, 110; Rule of Court, June term, 1865), and that such is the obvious meaning of that provision of statute (Taylor Statutes, 1792, section 3), which confines the issuing of the writ to officers in the county where the person is imprisoned.

2. That as the circuit court had jurisdiction of the subject matter and of the defendant, the order of the court refusing to quash the information, which the petitioner was held to answer, could not be reviewed on *habeas corpus*, and that this writ cannot be made to perform the functions of a writ of error: *In re Blair*, 4 Wis., 522; *In re O'Connor*, 6 *Id.*, 288; *In re Perry*, 30 *Id.*, 268; *In re Crandall*, 34 *Id.*, 177; *People v. Cassels*, 5 Ill., 164; Hurd on H. C., 332. When the court has jurisdiction, it shall determine every question without interference by any other tribunal (Hurd, 335, *et seq.*), and this includes jurisdiction to decide upon the sufficiency of the information: *State v. Hanser*, 33 Wis., 678.

3. That the information was sufficient, and, if otherwise, it might be amended on the trial. Tay. Stats., 1941, § 14.

4. That the subsequent production of the prisoner before a magistrate, and the proceedings thereupon, did not affect the right to hold him, though the officer might be liable (Hawk. P. C., b. 2, ch. 19, § 12, p. 194), that neither the district attorney nor the jailor could waive or prejudice the right of the state to hold and try the petitioner, and that, in any event, the prisoner should not be discharged, but should be remanded for such proceedings as might be proper. Hurd, 46 *et seq.*; *State v. Bloom*, 17 Wis., 521; Tay. Stats., 1797, § 21.

COLE, J. This is an application for a writ of *habeas corpus*. We were in some doubt whether, upon the face of the petition,

and the papers annexed to and made a part thereof, a writ should be granted by this court; or, if granted, whether, upon the facts stated, the petitioner would not have to be remanded to his former custody. It was therefore deemed best to have an argument on certain points in the application. The attorney-general and the counsel for the petitioner have argued questions suggested, which would necessarily have to be considered in determining whether the petitioner would be entitled to a discharge from imprisonment. If these questions should be decided against the petitioner, the writ would be unavailing, even if granted. And as we are now satisfied that upon the case presented the petitioner could not be discharged, the writ is denied on that ground alone, as was done in the cases, *In re Gregg*, 15 Wis., 479; *In re Griner*, 16 Id., 423, and *Petition of McCormick*, 24 Id., 492.

One question upon which argument was requested was, whether the practice of granting writs of *habeas corpus* in a proper case, as it has heretofore obtained, has been affected or should be changed in view of the recent decisions in regard to the original jurisdiction of this court over writs of injunction, *mandamus* and *quo warranto*, as defined and limited in *Attorney-General v. Railway Companies*, 35 Wis., 425; *Attorney-General v. The City of Eau Claire*, 37 Id., 400; *State ex rel. Wood v. Baker*, 38 Id., 72, and *State ex rel. Cash v. The Supervisors of Juneau Co.*, Id., 534. This question of jurisdiction was quite fully argued; but, for the reason just suggested, it is not necessary to decide on its application. It is dismissed with the remark that we entirely concur in the view of the petitioner's counsel on this point, that no rule should be adopted restricting the jurisdiction of this court over the writ of *habeas corpus*, which has ever been regarded as the best safeguard of personal liberty, except for the most weighty reasons. The plenary power of this court over the writ has frequently been asserted and exercised under the constitution, and has hitherto not been questioned. But we pass from the jurisdiction question to other points arising on the application.

Another question arising in the case is, can the petitioner be relieved by means of this writ, or must he resort to some other appropriate process to review and correct the proceedings of the circuit court? This leads to an inquiry as to the office of the writ, and what matters can be considered upon it. And at the outset it may be observed, that the principle is well settled, that

a writ of *habeas corpus* does not have the scope, nor is it intended to perform the office, of a writ of error or appeal. This doctrine is almost elementary in the law. The writ, then, cannot be resorted to for the purpose of reviewing and correcting orders and judgments which are erroneous merely. It deals with more radical defects, which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void. A distinction between a proceeding or judgment which is void, and one that is voidable only for error, is recognized in the cases, and must be observed. Says Dixon, C. J., in *Petition of Crandall*, 34 Wis., 177: "It is conceded that for mere error, no matter how flagrant, the remedy is not by writ of *habeas corpus*. For error, the party imprisoned must prosecute his writ of error or *certiorari*. Nothing will be investigated on *habeas corpus* except jurisdictional defects, or illegality, as some courts and authors term it; by which is meant the want of any legal authority for the detention or imprisonment." P. 179. To the same effect is the doctrine laid down in *In re Blair*, 4 Wis., 522; *In re O'Connor*, 6 Id., 288; *In re Perry*, 30 Id., 268. Now, the inquiry is, in the light of these adjudications, did the circuit court act without jurisdiction, or in excess of its jurisdiction, in the matter complained of, or did it make merely a wrong decision? There can be no doubt that the circuit court had jurisdiction of the person of the petitioner, and of the offense charged in the information. But it is claimed that the first and second counts in the information charged no offense; in other words, that the information is insufficient, and that the motion to quash for that reason should be sustained. This may be at once conceded, but what follows? Manifestly this, that the circuit court gave a wrong decision where it clearly had jurisdiction, in holding a defective information good. The court committed an error, but there is no ground for saying it acted without jurisdiction in rendering its decision. If a demurrer had been filed to the information, and overruled by the court, precisely the same question would have been presented. It is a case of error, for which the petitioner can only have relief on writ of error or some other appropriate process of review. He cannot have relief on a writ of *habeas corpus*, without making such writ perform all the office of a writ of error. This seems very obvious. Nor does the fact that this court, under the constitution, has appellate jurisdiction over the circuit courts, in any way affect the question before

us. For this court can only exert revisory or appellate jurisdiction on proper process, proceeding according to the rules of law. It cannot overlook and disregard the well established distinction between the scope and operation of a writ of error and a writ of *habeas corpus*, and make the latter a substitute for the former. And the distinction has been clearly recognized in the above decisions. In the case of *Hanser v. The State of Wisconsin*, 33 Wis., 678, a strictly analogous question was considered. That was a *certiorari* to review the decision of the municipal court of Milwaukee refusing to quash a criminal information for a libel against a corporation. It was claimed that a corporation could not be the object of a criminal libel, and that the municipal court erred in holding the contrary. But this court held that even if that position was well taken, the real question presented to the municipal court for decision was, whether the information did or did not charge the accused with the commission of a criminal offense, and that this was in no sense a jurisdictional question. It refused to review the decision on the motion to quash, upon *certiorari*, and quashed the writ. The operation of the writ of *certiorari* is certainly as extensive as the writ of *habeas corpus*; still this court declined to examine on that writ the correctness of the ruling of the municipal court in refusing to quash. The reason and principle of that decision are directly applicable to the case at bar. So in *Ex parte Booth*, 3 Wis., 145, the petitioner applied to this court for a writ of *habeas corpus* to discharge him from imprisonment. It appeared that he was in confinement by force of a warrant of the district court of the United States; and that the object of the imprisonment was to compel him to answer an indictment for a violation of the fugitive slave law. That law had been held to be unconstitutional by this court in a previous case. Whiton, C. J., says: "These facts show that the district court of the United States has obtained jurisdiction of the case, and it is apparent that the indictment pending against the petitioner is for an offense of which the courts of the United States have exclusive jurisdiction. We do not see, therefore, how we can, consistently with the principles of our former decision, interfere," p. 148. The writ was denied. The petition before us shows that the applicant is committed on an order of the circuit court for want of bail. He is held by the process of a court of competent jurisdiction, which had authority to make the order. For these reasons, neither the sufficiency of that order

nor the
now b

But
applic
arisen
ting a
petiti
petiti
quent
charge
we do
view
petiti
petiti
ent en
circuit
and if
petiti
plaint
deem
nizanc

Exo
dent t
no ex
to asc
is for
tion.
respe
court
state
gation
circuit
grou
the g
petit
By

nor the correctness of the decision on the motion to quash will now be inquired into.

But we think it would be very proper for the circuit judge, on application of the petitioner, to inquire whether any cause has arisen since the making of the order of the 9th of April, for putting an end to the commitment upon it, or for admitting the petitioner to bail on his own recognizance. It is stated in the petition that the offense charged in the complaint made subsequent to the order, is the same offense as that attempted to be charged in the information. Notwithstanding this statement, we do not feel justified in assuming that it is the same offense, in view of the second complaint and other papers annexed to this petition. According to these papers, it would seem that the petitioner was proceeded against for another offense, or a different embezzlement from the one set out in the information. The circuit judge can, however, readily determine whether this is so, and if it is not, afford the proper relief in respect to bail. The petitioner has given a sufficient recognizance on the second complaint, and this fact the circuit judge should and doubtless would deem a valid ground for admitting him to bail on his own recognizance if the charges are for the same embezzlement.

Excessive bail is forbidden by the constitution, and it is evident that double bail might be excessive. It is true, there was no examination on the second arrest, but it will not be difficult to ascertain from the district attorney whether that prosecution is for the same embezzlement as the one charged in the information. If it is, the circuit court can make the proper order in respect to bail. It seems unnecessary to issue the writ from this court to inquire into the matter, since to do so would subject the state and the petitioner to the trouble and expense of an investigation here, which could be had more conveniently before the circuit judge. Besides, the writ was not asked for on any such ground or for any such purpose. These suggestions are made for the guidance of all concerned. But, upon the facts stated in the petition, the writ must be denied.

By the court. It is so ordered.

HOLLEY v. STATE.

(15 Fla., 688.)

HABEAS CORPUS: *To be admitted to bail.*

A party indicted for murder is entitled, upon proper application, to a writ of *habeas corpus* for the purpose of showing such facts as may satisfy the court that the proof is not strong or the presumption is not great that he is guilty of a capital offense, and that he is entitled to be discharged on bail. The indictment charging a capital offense is not conclusive upon such application, under the statute, as to the character of the testimony.

Writ of error to circuit court of Jackson county.

McClellan & Milton, for plaintiff in error.

The Attorney-General, for the state, submitted the case on the authority of *Finch v. State*, reported in this volume.

RANDALL, C. J. The plaintiff in error, indicted for murder, applied to the court for a writ of *habeas corpus* for the purpose of discharge on bail, upon the ground that he was not guilty, and upon the ground that the proof was not evident, nor the "presumption great;" that the evidence on the part of the state was merely circumstantial and hearsay, and does not even raise a presumption of guilt; and, further, that he is an invalid and his health will be impaired by confinement in jail until the next term of the court.

The judge refused to grant the writ substantially upon the ground that the finding of an indictment by a grand jury established the fact, for the purpose of this application, that the proof was evident and the presumption great.

At the last term of this court we held, in the case of *Finch v. The State*, that a party indicted for murder is entitled, under the laws of this state, upon *habeas corpus*, to produce such evidence as may operate to convince the court that the offense is of such grade, or that there are such strong doubts in the case that a jury should not, upon the case as presented, convict of a capital offense, and be discharged on bail.

Of course, upon such an application, the public prosecutor should have sufficient notice of the time and place of the hearing to prepare therefor and to produce evidence. Whether in such case the public interests require the prosecutor to produce any evidence beyond the indictment, must be judged of by him and

by the court, and the conclusion of the court upon the case as presented will not prejudice the state or the accused when the facts are presented to a jury.

The order of the circuit court is reversed, and the case remanded with direction that the writ be granted.

ERWIN v. STATE.

(29 Ohio St., 186.)

HOMICIDE : *Self-defense—Justifiable and excusable homicide—Erroneous charge—Presumption of malice from use of deadly weapon—Impartial jurors—Error without prejudice—Right to discharge for want of trial.*

The respondent was in a shed, the right of possession to which was in dispute between himself and the deceased. Angry words having passed between the parties, the deceased advanced with an ax on his shoulder to the shed in a threatening manner. The defendant warned the deceased not to enter, but without heeding this warning, the deceased advanced to the eve of the shed, almost if not quite within striking distance of the deceased, when the latter shot him with a pistol and killed him. *Held*, that if the respondent was lawfully in the shed attending to his business, and without blame, he was not bound to retreat even though he might have done so with safety, but might defend himself where he was, even to the taking of life, if necessary.

Where a man pursuing his lawful business and without any fault or blame on his own part, is *feloniously* assaulted, he is not bound to retreat even though he may do so with safety, but he may defend himself where he is, and if in his own defense he necessarily kills the felonious assaulter, the killing is justifiable homicide. If the assaulted party is himself at fault, he is bound to retreat as far as he can with safety, but if, having retreated as far as he can with safety, he necessarily kills his adversary to save himself from death or grievous bodily harm, the killing is excusable homicide.

Where the circumstances of the killing are not disclosed by the evidence beyond the fact that it was done with a deadly weapon, the law presumes malice from the use of the deadly weapon; but where all the facts and circumstances attendant upon the killing are disclosed by the evidence, the inference of malice is to be drawn, if at all, by the jury from all the circumstances, of which the use of the deadly weapon is one.

Where the evidence is conflicting, and a part of it tends to establish justifiable homicide in self-defense, a charge that, "in this case, the law raises a presumption of malice from the use of a deadly weapon," is erroneous.

Under the Ohio statute it is error to overrule a challenge for cause to a juror who states that he has formed and expressed an opinion as to the guilt or innocence of the respondent from reading a report of the testimony of the witnesses given on a former trial, even though he states also that he feels himself able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence.

But where a juror who should have been rejected for cause is afterwards peremptorily challenged and a full panel of impartial and acceptable jurors is obtained before the respondent has exhausted his peremptory challenges, the error does not prejudice him and is no ground for reversal.

Under a statute providing that a person under indictment who has given bail for his appearance, shall be discharged if not brought to trial before the end of the third term of the court in which the indictment is pending, unless the trial is postponed on his application, or because there is no time to try it at such third term, the respondent is not entitled to be discharged, where the trial is postponed from term to term without any objection on his part, although more than three terms pass without a trial. In order to get the benefit of the statute, the respondent must apply to the court for a trial or his discharge, and if the prosecution are ready to try the case at the term in which he applies for his discharge, but are prevented from trying it because there is not time to try it at that term of court, the respondent is not entitled to be discharged.

McILVAINE, J.: The plaintiff in error was indicted for the crime of murder in the first degree at the February term, 1872, of the court of common pleas of Gallia county. At the succeeding term, in May of the same year, a trial was had which resulted in a verdict of guilty of murder in the second degree. This verdict was set aside by the court, and the defendant was admitted to bail. At the March term, 1876, he was again put upon trial, convicted, and sentenced for murder in the second degree.

At the several terms of the court intervening between May, 1872, and the October term, 1875, the cause was continued without objection on the part of the defendant, who from time to time gave bail for his appearance as required by the court.

At the last named term, to wit, on the 13th day of September, 1875, the defendant moved the court for his discharge under section 162 of the criminal code (66 Ohio L., 311), which provides as follows: "If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term." Two days thereafter, to wit, on the 15th of the month, the same being the last day of the term, and the state being then ready to proceed to trial, this motion was overruled by the court and the cause continued, for the reason that there was no time to try the cause at that term.

When
ing, it
reason
term th
the stat
tried at
ordered
2. U
venire
qualifie
formed
the def
nesses
defenda
from f
selves a
verdict
lenges
Such ju
crimina
Frazie
record,
wards e
imparti
named
his righ
resulte
See M
3. T
the tes
by def
son an
der in
define
statute
ciously
every
degree
withou
while
such p

When the above section is considered with section 163, following, it is clear that a defendant can not be discharged for the reason stated, except upon an application to the court during a term thereof; and when an application is made at a term when the state is ready to proceed to trial, but the cause can not be tried at such term for want of time, the discharge should not be ordered. See *Ex parte McGehan*, 22 Ohio St., 442.

2. Upon the last trial, several persons named in the special *venire* for thirty-six jurors, were examined under oath as to their qualifications as jurors, who stated severally that they had formed and expressed an opinion as to the guilt or innocence of the defendant from reading a report of the testimony of witnesses offered on the former trial of the case. Thereupon the defendant challenged such jurors for cause. But it appearing from further examination of such jurors that they felt themselves able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court refused the challenges for cause. These challenges should have been sustained. Such jurors are not rendered competent by section 134 of the criminal code, as amended February 10, 1872 (69 Ohio L., 11): *Frazie v. The State*, 23 Ohio St., 551. It appears from the record, however, that each of these objectionable jurors was afterwards excused on a peremptory challenge, and that a full panel of impartial and acceptable jurors was obtained from the persons named in the special *venire*, before the defendant had exhausted his right of peremptory challenge, so that, in fact, no prejudice resulted to defendant from such erroneous ruling of the court. See *Mimms v. The State*, 16 Ohio St., 221.

3. The alleged death was caused by a shot from a pistol, and the testimony tended to show that the homicide was committed by defendant upon a sudden quarrel, and in defense of his person and property. The charge in the indictment included murder in the second degree and manslaughter. The court properly defined these crimes to the jury substantially in the words of the statute, namely: "That if any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree," and, "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter." Where-

upon the court said to the jury, "You will see that the difference between manslaughter and murder in the second degree is the absence of malice and purpose to kill." And thereupon the court proceeded to charge as follows: "If you find from the evidence that the defendant used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice *in the defendant*, and also an intent *on his part* to kill the deceased."

We can well see how the jury, under these instructions, may have been led to convict the defendant of murder in the second degree, though guilty of manslaughter only, or even though not guilty of any crime whatever. It was plainly inferable, from the first instruction above stated, that the defendant's crime was not manslaughter, if the killing were intentional. Such is not the law of manslaughter. If the killing be unlawful, but without malice, as upon a sudden quarrel, although intentional, the crime is, nevertheless, manslaughter only. It is true that the jury must have found the presence of malice as well as purpose to kill; but having first found the purpose to kill, as we may suppose, they entered on the inquiry as to malice, under the influence of an instruction that the defendant was guilty of murder, or not guilty of any crime whatever, thus exposing the defendant to a moral influence against him, which should not have had lodgment in the minds of the jurors.

But the latter instruction, though not so clearly erroneous, was more palpably prejudicial to the defendant as misleading to the jury. As an abstract proposition, where the circumstances of a homicide are not known, further than the mere fact that the death was caused by the use of a deadly weapon, we do not deny that the jury may, from such fact alone, infer both malice and a purpose to kill. But where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill, from the isolated fact that death was caused by the use of a deadly weapon. In such case the presence of malice or intent to kill must be determined from all the circumstances proven, including, of course, the character of the weapon. It may indeed be said, with much reason, that the use of a deadly weapon, in the taking of life, raises the same presumptions whether other attending circumstances be shown or not; and

that wh
strengt
ter of t

The
but, rat
pret an
you fin
weapon

illy
in the
dent."

This
before
gence n
defenda
the life
regard
another
stances,
to the c
relates
bound

4. It
jury as

The
in-law,
ent how
but not
shed su
This bu
a cropp
and als
A cont
sion of

Shor
thrown
and loc
the hon
and th
angry
an ax c

that when other facts and circumstances are shown, they either strengthen or rebut the presumptions so arising from the character of the weapon.

The question before us, however, is not one of mere logic; but, rather, how would jurors of ordinary understanding interpret and reason upon such a charge? The instruction was: "If you find, from the evidence, that the defendant used a deadly weapon in this case, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice in the defendant, and also an intent on his part to kill the deceased."

This was not an abstract proposition. It covered the case before the jury; and, in our opinion, a jury of ordinary intelligence might well understand that the law fixed the guilt of the defendant as a murderer, if the evidence showed that he took the life of the deceased by the use of a deadly weapon, without regard to other circumstances, save only, as they were told in another part of the charge, that he might, under certain circumstances, justify on the ground of self-defense. But our objection to the charge is independent of all questions of self-defense, and relates to it solely as bearing on the case which the state was bound to prove in order to entitle it to a conviction.

4. It is also claimed that the court below erred in charging the jury as to the law of defense.

The case shows that the defendant and the deceased, his son-in-law, resided upon lands belonging to the defendant, in different houses, situated a short distance apart. Between their houses, but not within the curtilage of either, there was a corn-crib and shed suitable for the storage of grain and farming implements. This building was situated in a field cultivated by the deceased as a cropper, and had been used by him for the storage of grain, and also by the defendant for the storage of his farming tools. A controversy arose between the parties as to the right of possession of the building.

Shortly before the homicide the defendant's tools had been thrown out of this shed, and were replaced and secured by chains and locks. These chains were afterwards broken. On the day of the homicide the defendant was in the shed securing his tools, and the deceased was near his own house, and close by, when angry words passed between them, whereupon the deceased, with an ax on his shoulder, approached the shed in a threatening man-

ner, and when near it the defendant warned him not to enter. Without heeding this warning, the deceased advanced to the eve of the shed, perhaps within striking distance of the defendant, when the latter shot him with a pistol, inflicting a wound from which death soon followed. Testimony was offered on the trial, more or less conflicting, as to previous bitter feelings between the parties, also as to the threatening attitude of the deceased at the time of the shooting, and as to the defendant's facilities for retreat from the place occupied by him at the time.

The portion of the charge complained of was as follows: "If you find, from the greater weight of the evidence, that the defendant was, at the time the fatal shot was fired, in the lawful pursuit of his business, and he was attacked by the deceased under circumstances which denote an intention to take away his life, or to do him some great bodily harm, he may lawfully kill his assailant, provided he use all means in his power otherwise to save his own life, or to prevent the intended harm, such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power.

"But if the attack upon him is so sudden, fierce and violent that a retreat would not diminish, but increase his danger, he may kill his adversary without retreating; and, further, if you find, from the evidence, that from the character of the attack there was reasonable ground for the defendant to believe, and from the evidence you find the defendant did honestly believe that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger by retreating, then, if he took the life of the assailant he would be excused."

The contention, on the part of the plaintiff in error, is that the court below erred in the application of the doctrine of "retreating to the wall." The question here presented has not been decided in any of our reported cases, although it has been often raised and variously determined in our *nisi prius* courts. It may be said, indeed, that learned courts and able text-writers have left the question in some obscurity. The true solution must, undoubtedly, be determined upon the principles of the common law; and such is the present state of the authorities, that it seems necessary to examine the books of the law written at a period before the apparent or real confusion had an existence.

WH
as hu
either
recogn
tute,
itable
fight
back
which
guard
yet no
endo,
regar
itable
and, t
forfei
fiercel
back,
defen
defen
says:
inevit
abroad
himse
this is
etc., r
Sir
Hale's
defen
endo,
death
party
purch
all ki
be "
himse
follow
anoth
lence
cases
COWA

When the common law had become a system as nearly perfect as human reason could make it, homicide *se defendendo* was either justifiable or only excusable. This distinction was clearly recognized. In speaking of manslaughter, Lord Coke (3 Institute, 55) says: "Some be voluntary, yet being done upon inevitable cause are no felony—as if A be assaulted by B, and they fight together, and before any mortal blow be given, A giveth back until he cometh to a hedge, wall or other straight, beyond which he can not passe, and then, in his own defense, and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony; and the jury that finde that it was done *se defendendo*, ought to finde the special matter. And yet such a precious regard the law hath of the life of man, though the cause be inevitable, that, at the common law, he should have suffered death; and, though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels. * * * If A assault B so fiercely and violently, and in such manner as if B should give back, he should be in danger of his life, he may, in this case, defende himselfe; and if, in that defense, he killeth A, it is *se defendendo*." And on page 56, speaking of the same subject, he says: "Some, without giving back to a wall, etc., or other inevitable cause, as if a thief offer to rob or murder B, either abroad or in his house, and thereupon assault him, and B defende himself without giving back, and in his defense killeth the thiefe, this is no felony; for a man shall never give away to a thiefe, etc., neither shall he forfeit anything."

Sir Matthew Hale, speaking of homicide *ex necessitate* (1 Hale's Pleas of the Crown, chap. 40), says that homicide in defense of a man's own life, which is usually styled *se defendendo*, is of two kinds: "1. Such, as though it excuseth from death, yet it excuseth not the forfeiture of goods, nor is the party to be absolutely discharged from prison, but bailed, and to purchase his pardon, of course. 2. Such as wholly acquits from all kinds of forfeiture." He defines homicide *se defendendo* to be "the killing of another person in the necessary defense of himself against him that assaults him;" and states the rule as follows: "3. Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for, in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy; yet, in cases of assaults and

affrays between subjects, under the same law, the law owns not any such point of honor, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another."

But this hath some exceptions:

"1. In respect of the person killing. * * * 2. In respect to the person killed. If a thief assaults a true man, either abroad or in his house, to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony."

About a century later (1762), Mr. Justice Foster, in his admirable discourse on the law of homicide, founded in necessity (Foster's Crown Cases, chap. 3, p. 273, *et seq.*), says: "Self-defense naturally falleth under the head of homicide founded in necessity, and may be considered in two different views. It is either that sort of homicide, *se et sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blamable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law. The writers on the crown law, who, I think, have not treated the subject of self-defense with due precision, do not in terms, make the distinction I am aiming at; yet all agree that there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defense; they justifiable homicide. They, likewise, agree that there are cases in which the defendant can not avail himself of the plea of self-defense without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defense, culpable, but, through the benignity of the law, excusable. In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property, against one who manifestly intendeth and **endeavoreth**, with violence or surprise, to commit a known felony on either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

In 1803, Mr. East published his excellent Treatise on the Peace of the Crown, and on page 271, says, in speaking of homicide from necessity: "Herein may be considered: 1. What sort of attack it is lawful and justifiable to resist, even by the death of

the as
such l
not f
author
his p
intenc
know
the li
but m
all da
self-d
any p
a bare
that a
panie
not w
must

In
cite a
under
shows
far as
from
from

Sho
the C
States
in th
copie
by Ju
(Self
the d
Park
free
for w

Th
whon
charg
say;
defen
ever

the assailant, and where the party is without blame. 2. Where such killing is only excusable, or even culpable, and the party is not free from blame," etc. In relation to the first sort, the author says: "1. A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill him in so doing, it is called justifiable self-defense; as, on the other hand, the killing, by such felon, of any person so lawfully defending himself, will be murder. But a bare fear of any of these offenses, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant in killing that other by way of prevention. There must be an actual danger at the time."

In this connection it is hardly necessary to add, much less to cite authority to show, that a homicide which can not be justified under the foregoing rules, can not be excused unless the slayer shows that before the mortal blow was given he had retreated as far as he safely could, and that he killed his adversary solely from the necessity which then existed, in order to save himself from immediate death or enormous bodily harm.

Shortly after the publication of Mr. East's treatise, the case of the *Commonwealth v. Selfridge*, a leading case in the United States, was tried in the Supreme Judicial Court of Massachusetts, in the year 1806. The charge by the court below, as above copied, was a substantial transcript of the propositions announced by Justice Parker in his charge to the jury in Selfridge's case (Selfridge's trial, 100). In order to fully understand and apply the doctrine of Selfridge's case, it must be observed that Justice Parker assumed in his charge to the jury that Selfridge was not free from blame in provoking the assault from Young Austin, for whose death he was upon trial.

The deceased had taken upon himself the quarrel of his father, whom the defendant had but recently posted. I quote from the charge: "Who was originally in the wrong it is not for me to say; but I feel constrained to say that whatever provocation the defendant may have conceived to have been given him, and however great the injury the deceased's father may have done him,

he certainly proceeded a step too far in making the publication which came out in the morning of this unhappy disaster. To call a man coward, liar and scoundrel in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever. Such publication is libelous in its very nature, as it necessarily excites to revenge and ill-blood."

It also appears in the case that Selfridge anticipated an assault from some one on account of the publication, and had armed himself with a pistol, with which he shot the deceased immediately upon being assaulted with a cane. Such being the case, we do not understand that the right to defend, even unto death, without retreating, against a felonious assault, where the assaulted party was without fault, was intended to be denied by the learned judge. Indeed, in the charge, we find the following: "Numerous authorities, ancient and modern, have been read to you upon this subject." (Homicide *se defendendo*, both justifiable and excusable.) "Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassment, there being in some instances an apparent, though in none a real incongruity." If anything further was needed to show that Justice Parker, in his charge, intended to limit the duty of "retreating" to cases of excusable killing in self-defense, and did not intend to extend the duty to cases of justifiable killing, it might be implied from the fact that in the previous month he was present with all the judges when Chief Justice Parsons charged the grand jury who indicted Selfridge as follows: "A man may repel force by force, in defense of his person, against any one who manifestly intends, or endeavors, by violence or surprise, feloniously to kill him. And he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense. But a bare fear, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant him in killing. There must be an actual danger at the time. And (in the language of Chief Justice Hale), it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, etc., that his life was in imminent danger, otherwise the killing of the assailant will not be justifiable homicide. But if the party killing had reasonable grounds for believing that the person slain

had a
appea
will be
the de
These
writer

By
homic
much
comm
upon

It is
defens
acquit
cases o
ferenc
wall, s
cases o
case fr
cases

It is
defens
except
be imm
avail h
questi
is viol
broug
he fail
so?
of hun
trespa
a true
assaila
his lif

No
may h
of tak
have
other

had a felonious design against him, although it should afterward appear that there was no such design, it will not be murder, but will be either manslaughter or excusable homicide, according to the degree of caution and the probable grounds for such belief. These principles have been recognized by the wisest and ablest writers on criminal law."

By observing the distinction between justifiable and excusable homicide *se defendendo*, as stated in the authorities above quoted, much of the discrepancy in the decisions of the courts where the common law prevails is made to disappear, most of the cases upon the facts being such as would only excuse the killing.

It is true, under our constitution, whether the killing in self-defense be justifiable or excusable, there must be an entire acquittal, for the reason that there is no forfeiture of goods in cases of excusable homicide. But this is no reason why the difference between the cases, as to the duty of retreating to the wall, should be ignored. The taking away of the forfeiture, in cases of excusable homicide, did not relieve the party in such case from the duty of retreating, nor did it impose such duty in cases where it was not before required.

It is true that all authorities agree that the taking of life in defense of one's person can not be either justified or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question, then, is simply this: Does the law hold a man, who is violently and feloniously assaulted, responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life, and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.

Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him, still, the jury could not have acquitted, if they found he had failed to do all in his power otherwise to save his own life or prevent the intended harm, as

retreating as far as he could, etc. In this, we think, the law was not correctly stated.

The suggestion by the attorney-general, that that rule should be declared the law which is best calculated to protect and preserve human life, is of great weight, and, we can safely say, that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims.

Of course, there is nothing in this opinion which will be understood as withdrawing from the jury the determination of every question of fact involved in an issue of *se defendendo*. Whether, under the law as here laid down, and such other rules as may be applicable to any particular case, a necessity existed at the time to take life in order to save life or prevent enormous bodily harm, as well as the question, whether the killing, under the circumstances of each case, was prompted solely by such necessity, or by other motives, is to be determined by the jury in such case.

Judgment reversed, and cause remanded for further proceedings.

NOTE.—On the question, as to what opinion shall be sufficient to render a person an incompetent juror on the trial of a criminal case, the authorities are still greatly divided. In Pennsylvania (*Staup v. Com.*, 74 Pa. St., 458) the rule is laid down in these words: "Whenever the opinion of the juror has been formed upon the evidence given on the trial at a former time, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. In such a case the bias must be too strong to be easily shaken off, and the prisoner ought not to be subjected to the chances of conviction it necessarily begets.

But where the opinions or impressions of the juror are founded on rumors or reports, or even newspaper statements, which the juror feels conscious he can dismiss; where he has no fixed belief or prejudice, and is able to say he can fairly try the prisoner on the evidence, freed from the influence of such opinions or impressions, he ought not to be excluded." The clear weight of authority supports the doctrine as laid down in this case. For various cases in which this opinion has been applied to particular facts, see 75 Pa. St., 424; 76 Pa. St., 414; 79 Pa. St., 308.

The New York statute, which provides in substance that an opinion or impression as to the circumstances, or as to the guilt or innocence of the prisoner, shall not be a sufficient ground for challenge for principal cause, provided that the juror declares on oath that he can render an impartial verdict, and provided the court be satisfied that he does not entertain such a present opinion as would influence his verdict, does not infringe upon the right to an impartial jury, and is constitutional: *Stokes v. People*, 53 N. Y., 164.

In K
a juror
and w
or fals
an opi
In A
former
compu
chang
50 Ala
The
down
a fixe
18 Ga
389; A
Brown
Ired.
Mich.
The
People
opini
tion t
case v
Sec
Bu
Missi
consi
rejec
remo
the j
he is
juror
a nev
befor
try t
Clar
Texu
Hom

In a

In Kansas a distinction is drawn between an opinion and an impression, and a juror who had received an impression from reading newspaper statements, and whose impression was not positive or fixed, but dependent upon the truth or falsity of the newspaper accounts, notwithstanding he might have expressed an opinion, was held competent: *State v. Mellicott*, 9 Kan., 257.

In Alabama the courts go very far in receiving as jurors persons who have formed opinions, and, contrary to the usual rule, it seems that any juror is competent if he is willing to swear that his opinion is not fixed, that it can be changed by evidence, and that it will not bias his verdict: *Carson v. State*, 50 Ala., 134.

The following cases may be cited in support of the general doctrine laid down in the Pennsylvania case cited, that an opinion to disqualify must be of a fixed and positive character: *Anderson v. State*, 14 Ga., 700; *Wright v. State*, 18 Ga., 383; *State v. Fox*, 25 N. J. L. (1 Dutch.), 566; *State v. Hinkle*, 6 Iowa, 389; *Baxter v. People*, 8 Ill. (3 Gilm.), 368; *State v. Sater*, 8 Iowa, 420; *State v. Broen*, 4 La. Ann., 505; *State v. Davis*, 29 Mo., 391; *State v. Ellington*, 7 Ired. (N. C.), L., 61; *Com. v. Webster*, 5 Cush. (Mass.), 295; *Holt v. People*, 13 Mich., 224; *O'Connor v. State*, 9 Fla., 215; *Fahnestock v. State*, 23 Ind., 231.

The following are some of the latest cases upon the general question: *People v. Weil*, 40 Cal., 268, where a juror who had formed a fixed, decided opinion, was held incompetent, notwithstanding he stated on cross-examination that his opinion was not an unqualified one, and that he could try the case upon the evidence, without regard to his previous opinions.

See, also, *People v. Broen*, 48 Cal., 253; *People v. Johnson*, 46 Cal., 78.

But there are authorities which draw the line much more closely. The Mississippi act, relating to the qualifications of jurors in criminal cases, is considered of doubtful constitutionality, and the rule in that state requires the rejection of a juror who has any opinion which it would require evidence to remove, whatever that opinion may have been founded on. And although the juror may claim to be unbiased, and able to render an impartial verdict, he is still incompetent (*Logan v. State*, 50 Miss., 269); and in Vermont, a juror who had expressed an opinion as to the guilt of the prisoner, on reading a newspaper account of the examination before a magistrate, a few weeks before, but who said that he had no opinion, and had formed none, and could try the case impartially on the evidence, was held disqualified: *State v. Clark*, 42 Vt., 629. Tending in the same direction are *Black v. State*, 42 Texas, 378; *Carroll v. State*, 5 Neb., 1; *Jackson v. Com.*, 23 Gratt. (Va.), 919.

KEE v. STATE.

(28 Ark., 155.)

HOMICIDE: *Correct charge as to death from improper treatment of injury—Evidence as to good character—Drinking spirituous liquors by jurors—Separation of the jury.*

In a case where some of the evidence tended to show that the wound inflicted by the respondent upon the deceased was not necessarily fatal, but that by neglect of the directions of the physician in charge maggots got into the wound, causing inflammation of the bowels, from which the wounded person died. A request to charge that "if the jury find that the wound

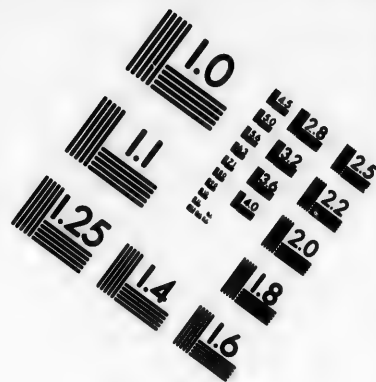
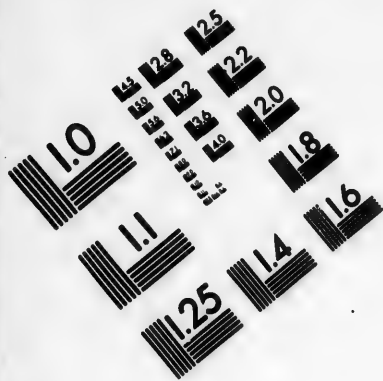
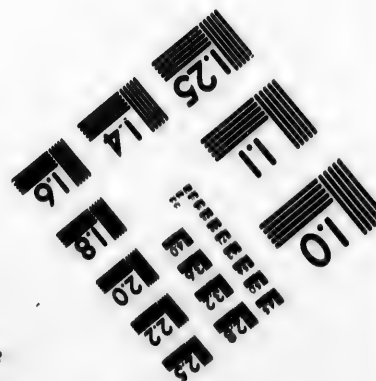
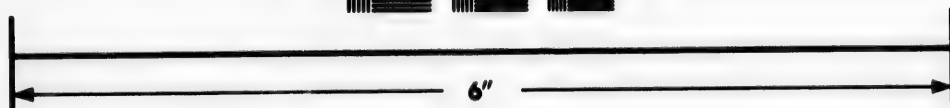
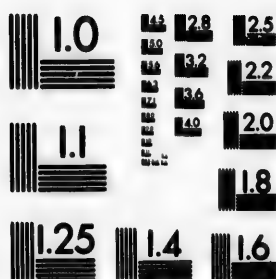


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 873-4803

14 128 125
13 122
12 20
11 8

10
11
12
13
14

inflicted by the defendant was not of itself mortal, but through negligence or the want of proper treatment became so and terminated fatally, and that neglect or want of proper treatment was the immediate cause of the death of the deceased, and not the wound itself, they must acquit the defendant," was held properly refused.

In such a case, it is proper to charge the jury that "if the jury believe, from the evidence, that the deceased, within the space of a year and a day from the infliction of the wound, died from some disease or disorder produced by said wound, inflicted by the voluntary act of the defendant, when not in danger of life or limb from the deceased, then they will find the defendant guilty as charged."

Held, that there was no error in charging that "if the jury believe, from the evidence, that the defendant willfully and unlawfully inflicted upon the deceased a mortal or dangerous wound, and from that wound and other aggravating causes, operating upon or caused by said wound, the deceased died, they should find the defendant guilty, and the defendant cannot, under the law, shelter himself by a plea of erroneous treatment of the deceased, either from his physicians or nurses."

A person on trial for crime has, in all cases, a right to give in his defense evidence of his good character as to the particular traits involved in the matter on trial, and there is no case so clear in which it is not error to reject such evidence.

The fact that the jury, pending the trial, were taken by the sheriff into a saloon, and treated by him to a drink of spirituous liquor, is not of itself sufficient ground for setting aside the verdict.

That while taking refreshments at a hotel, pending the trial, two of the jury being colored men, ate in a different room from the others, is not ground for a new trial.

SEARLE, J. The appellant was tried upon an indictment for the murder of one Langley, in the Woodruff circuit court, at the September term thereof, 1872. The jury found him guilty of murder in the second degree, and he was sentenced to eleven years of hard labor in the state penitentiary.

In the progress of the trial, divers exceptions were taken to the rulings of the court, upon evidence offered and upon instructions given to the jury as to the law of the case, all of which, after the verdict, were brought forward in a motion for a new trial. The motion for a new trial was overruled, to which appellant excepted, and filed his bill of exceptions, setting out all the evidence, the instructions given and refused by the court, and various other matters assigned as errors, and appealed to this court. The errors assigned as the foundation for a motion for a new trial, are substantially as follows:

1. That the verdict of the jury was contrary to the law and the evidence.

2. That the court erroneously gave the instructions asked to be given by the state, and refused to give those asked by the appellant.

3. That the court rejected legal and material testimony offered by the appellant

4. That the jury were permitted to go to a drinking saloon, and drank spirituous liquors during their deliberations.

5. That the jury were permitted to separate during the trial.

The correctness of the verdict of the jury, and also of the instructions of the court, by which the jury were directed to the verdict in the trial of the cause below, rests, in a great measure, if not entirely, upon the testimony which was before the jury. It is necessary, therefore, to look first to the testimony.

The wound which was received by the deceased was inflicted by the appellant on the 27th day of July, 1872, and death ensued on the 2d day of September, 1872.

Miller, witness for the prosecution, testified as follows: He was acquainted with the deceased and the prisoner; was in Augusta on the 27th day of July, 1872, and saw both Kee and Langley the evening of that day. He, with Langley and others, was in Gordon's store, when Kee, with one White, came in. Kee asked Langley to walk into the back room with him, whereupon deceased, Kee and White went into the back room. After some little time he (witness) heard quarreling between the prisoner and deceased in the back room; heard the deed given; did not know who gave it. He then went into the back room and saw the prisoner draw from his pocket an open pocket-knife, with which he struck deceased. Deceased returning the blow, the prisoner struck him again. Before the prisoner struck the deceased, the latter stepped back two paces. After the prisoner struck deceased the second time, T. B. Gordon and John Hodges came in and separated the parties. The wound which the prisoner inflicted upon the deceased, was upon his left side. Deceased told the prisoner that he was unwilling to fight, as he had been chilling for twelve months. Gordon and Hodges testified, substantially the same as Miller. White testified as follows: He saw prisoner and deceased on the 27th of July, 1872, first in Price's drinking saloon; some words passed between them there; deceased was rough, and used insulting language toward the prisoner. He (witness) left the saloon with the prisoner. Some time after, with the prisoner, he went to Gordon's store. While

there, the deceased came up and remarked to the prisoner, "I want to see you." Prisoner replied, "I don't want any fuss with you, and if I have insulted you, I am willing to make apologies." Prisoner, deceased and witness then went into the back room of Gordon's store. Prisoner said to deceased, "We are both drunk, let us go home, get sober and then meet on half-way ground and settle it." Deceased replied, "No, here is as good a place as any to settle it." After some more quarreling, deceased called the prisoner a d--d liar, and struck him. Prisoner then struck deceased. He (witness) saw no knife in prisoner's hand, but saw deceased pass his hand to his side and there saw blood.

Dr. Echols testified as follows: He was a practicing physician in the town of Augusta. On the 27th of July, 1872, deceased was brought to his office for treatment. On examination, he found that the deceased was wounded on the left side, across the seventh and eighth ribs. The wound was about six inches long and half an inch deep, and perforated the intercostal muscle in two places. He did not consider the wound mortal. He, with the assistance of Dr. Brunson, dressed the wound. The patient remained in town two days, and then, contrary to his advice, was removed to Maj. Dent's plantation, about seven miles from Augusta, in a common road wagon. The deceased remained under his professional charge from the time of the reception of the wound until his death. The wound commenced healing on first intention, and symptoms were favorable for the first fourteen days. He ordered the wound to be kept covered with a cloth saturated with a carbolic acid wash. In his (witness's) opinion, his instructions were not properly observed, as on or about the 14th of August, on examination of the wound, he discovered maggots in it, and, in his opinion, if his instructions had been followed, it would have been impossible for maggots to have got into the wound. The presence of the maggots caused inflammation of the bowels, from or on account of which inflammation the patient died. Dr. Brunson, who assisted in dressing the wound, stated, that in his opinion the wound was not necessarily fatal.

Maj. Dent, to whose house deceased was removed, testified that the deceased was as well cared for as possible, under the circumstances, it being August, and the weather being very hot. Pope, an attendant upon the deceased, testified that he followed

the di
ability

Upo
instru
defend
neglig
nated
the im
wound
refuse
the st
eviden
the in
produ
defen
then t

"If
willfu
dange
cause
they
under
of sai
to the
instru

It
came
had
time
cause
the
wou
obey
fore
effe
argu
port
diat
the
cou

the directions of the physician, Dr. Echols, to the best of his ability.

Upon this evidence the appellant's counsel asked the following instructions: "If the jury find that the wound inflicted by the defendant, on the deceased, was not of itself mortal, but through negligence or the want of proper treatment became so and terminated fatally, and that neglect or want of proper treatment was the immediate cause of the death of the deceased, and not the wound itself, they must acquit the defendant," which was refused, and in lieu thereof the following instructions, asked by the state counsel, were given: "If the jury believe from the evidence that Langley, within the space of a year and a day from the infliction of the wound, died from some disease or disorder produced by said wound, inflicted by the voluntary act of the defendant, when not in danger of life or limb from Langley, then they will find the defendant guilty as charged.

"If the jury believe from the evidence that the defendant willfully and unlawfully inflicted upon Langley a mortal or dangerous wound, and from that wound and other aggravating causes, operating upon or caused by said wound, Langley died, they should find the defendant guilty; and the defendant cannot, under the law, shelter himself by a plea of erroneous treatment of said Langley, either from his physicians or his nurses;" and to the refusal to give the first and to the giving of the last two instructions, the appellant excepted.

It is contended by the appellant's counsel that the deceased came to his death by inflammation of the bowels; that the death had no relation to the wound, "except that of sequence" (as to time, we presume, they mean), and that the inflammation which caused the death was not the effect of the wound either, but of the maggots, and that the maggots were not the effect of the wound, but of the negligence on the part of the nurses, in not obeying the instructions of the physicians. They insist, therefore, that the death had no connection with the wound as the effect thereof, mediately or immediately. They consequently argue that the verdict of the jury was without evidence to support it, as to the fact that the wound was the mediate or immediate cause of the death, which fact the jury must have found as the foundation of their verdict; and that the instructions of the court upon the state of facts presented by the testimony were

erroneous, and tended to misdirect the jury to their erroneous finding and verdict.

The following are, we think, the correct rules or doctrines in relation to the questions presented by the exceptions which we are considering. The evidence must connect the death with the blow charged: Wharton's American Criminal Law, 1034. "The general rule (to use the language of Mr. Bishop in his Treatise on Criminal Law), both of law and reason, is that whenever a man contributes to a particular result, brought about, either by sole volition of another, or by such volition, added to his own, he is to be held responsible for the result, the same as if his own unaided hand had produced it. The contribution, however, must be of such magnitude and so near the result that, sustaining to it the relation of cause and effect, the law takes it within its cognizance. Now, these propositions conduct us to the doctrine that, whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible, if death follows, he will be holden for murder or manslaughter, though the person beaten would have died from other causes, or would not have died from this one, had not others operated with it; provided, that the blow really contributed mediately or immediately to the death, as it actually took place, in a degree sufficient for the law's notice." Bishop on Criminal Law, section 653. See, also, 2 Whart. Am. Crim. Law, section 941. This, we think, is the correct doctrine, expressed in very general terms, as gathered from numerous cases cited by Mr. Bishop and Mr. Wharton.

It is said in *Rex v. Rew*, 1. Kel., 26, "That Edward Rew was indicted for killing Nathaniel Rew, his brother, and upon the evidence, it was resolved that, if one gives wounds to another who neglects to cure them, or is disorderly and does not keep that rule, which a person wounded should do, yet if he die, it is murder or manslaughter, according as the case is, * * * because, if the wound had not been, the man had not died; and, therefore, neglect or disorder in the person who receives the wounds shall not excuse the person who gave them." And Lord Hale says: "If a man receives a wound which is not in itself mortal, but either for want of helpful appliances or neglect thereof, it turns to a gangrene or fever, and the gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or

wound
of his
or ga
wound
quent
Com.
La. (A
the la
the de
deceas
stance
the w
it."
hurt
about
it ele
cause
slaugh
to be
autho
party
wound
has n
Conn
Bu
ous;
and l
clear
wound
the n
is re
Mel
C., 4
ities
soun
be t
wor
sup
case
his
and

wound; for the wound, though it were not the immediate cause of his death, yet it were the mediate cause thereof, and the fever or gangrene were the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is *causa causati*: 1 Hale's Pl. C., 428. See, also, *Com. v. Hackett*, 2 Allen (Mass.), 136; *The State v. Scott*, 12 La. (An.), 274; and *McAllister v. The State*, 17 Ala., 439. In the latter case, Dargen, C. J., speaking for the court, said: "If the death be owing truly to the wound, it signifies not that the deceased would have recovered under more favorable circumstances or with more prudent care; the death being the result of the wound, the party inflicting it must be held responsible for it." But, on the other hand, it has been said, "If the wound or hurt be not mortal, but with ill appliances of the party or those about him, of unwholesome salve or medicines, the party dies, if it clearly appear that this medicine, and not the wound, was the cause of his death, it seems it is not homicide (murder or manslaughter); but then that must appear clearly and certainly not to be so:" 1 Hale's Pl. C., 428. Likewise, by more recent authorities, that "when the wound was not of itself mortal, the party died solely of the improper treatment and not at all of the wound, the result is otherwise," that is, murder or manslaughter has not been committed: 3 Greenl. Ev., section 139; *Rex v. Connor*, 2 Car. & K., 518; *Parsons v. The State*, 21 Ala., 300.

But Mr. Bishop says that this doctrine "is practically dangerous; because in law, if the person dies by the action of the wound, and by the medical or surgical action jointly, the wound must clearly be regarded sufficiently a cause of the death. And the wound need not even be a concurrent cause, much less need it be the next proximate one; for it is the cause of the cause; no more is required:" 2 Bish. Crim. Law, section 654; see, also, *Com. v. McPike*, 3 Cush., 181; *Rex v. Minnock*, 1 Crawf. and Dix. C. C., 45. The doctrine as enunciated and illustrated by the authorities above quoted and cited, has its foundation in a wise and sound policy, and to uphold the reverse of it, or any other, would be to establish a most dangerous precedent, and one which would work the acquittal of the offender in every case where the wound superinduced other disease of which the victim died. In the case under consideration, so far as the wounding of the deceased, his treatment by removal from Augusta to Dent's plantation, and the nature of the wound are concerned, the evidence is con-

flicting; as to the treatment of the wound the evidence is conflicting; the physician testifying that his directions were not followed by the nurses, and the nurses testifying to the contrary. But we apprehend that this has but little to do with the law of the case; it was a matter which was exclusively within the province of the jury to consider and determine. By a process of very refined reasoning, the appellant's counsel endeavored to show that there was no such relation between the death of the deceased and the wound by which it could be predicated that the former was in any sense the effect of the latter, or in other words, that the wound was the cause of the death, either immediately or mediately. We are free to confess that we cannot see the force of this reasoning.

Grant that the wound "was not necessarily fatal," as testified to by Dr. Bronson; grant also that the nurses were negligent in their care of the deceased, and that the maggots would not have appeared had the physician's instructions been observed, still it cannot be doubted that the wound was the efficient cause of the maggots, and the negligence of the nurses was merely the occasion of their appearance. Nor can it be doubted that the wound itself, and the maggots thus caused and occasioned, were conjointly the efficient causes of the inflammation which resulted in death. This, then, clearly comes within the doctrine laid down by Mr. Bishop and supported by Lord Hale, and nearly all the authorities, that the wound need not even be a concurrent cause, much less need it be the next proximate one; for it to be *causa causati*, no more is required to constitute the offense.

The fact, then, that the deceased was removed in a rough manner, and that the nurses failed or neglected to carry out the instructions of the physician (if this were true), and which may have aggravated the wound, ought not to mitigate the crime of the appellant, whose malice in the infliction of the wound caused the death. To do that, it must plainly appear that the death was caused neither immediately nor mediately by the wound, but only and entirely by the improper treatment from persons other than the appellant. The position assumed by the counsel, namely, that the state adduced no testimony to show that in point of fact the deceased died from the effect of the wound immediately or mediately, is untenable. The state proved that the appellant cut deceased, that the inflammation resulted from the wound inflicted (occasioned by improper treatment, it may be,

but the
light o
we are
above
and th
dence
the la
The v
eviden
did no
ment
ered.
offere
neigh
refuse
Th
right
can ha
one li
that
gener
woul
Wha
1 Gro
W
to th
plain
with
to be
belie
ing
1 B
Stat
It
ing
this
proc
trov
let
cutt
this

but this is immaterial), and from which deceased died. By the light of the above authorities and in view of the facts of the case, we are of opinion that the court did not err in relation to the above instructions. The jury were the sole judge of the facts, and their verdict is in accordance with the weight of the evidence. The jury found that the deceased came to his death at the hands of the appellant, and that the killing was felonious. The verdict, therefore, was not inconsistent with the law and evidence, and so far as these exceptions are concerned, the court did not err in refusing to grant a new trial. The third assignment of error in the motion for a new trial will next be considered. The appellant, after the state had closed her evidence, offered testimony to prove that he had the reputation among his neighbors of a quiet and peaceable citizen. This testimony was refused, and the appellant excepted.

That a person, on trial for a crime charged against him, has a right to offer, in his defense, testimony of his good character, we can have no doubt. This is and ought to be the general rule, with one limitation, however, as laid down by the authorities, namely, that "in such case the character sought to be proved must not be general, but such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged." Whart. Am. Crim. Law, sec. 636; 1 Bish. Crim. Proc., sec. 489; 1 Greenl., sec. 55.

With this limitation, such testimony should be allowed to go to the jury in every case, whether it be regarded by the court as a plain or doubtful one, and be considered by them in connection with all the other facts and circumstances, and if the case happen to be a plain one, and from the facts of the crime charged they believe the accused to be guilty, they must so find, notwithstanding his good character: 1 Greenl. Ev., sec. 55; 3 *Id.*, sec. 25; 1 Bish. Crim. Pr., sec. 489; 1 Whart. Am. Crim. Law, 636; *State v. Henry*, 5 Jones, 87; *Carroll v. State*, 3 Humph., 315.

It is urged by the counsel for the state, that, notwithstanding the general rule, this exclusion of evidence was not error in this case, because the proof of the cutting was conclusive, and proof of appellant's good character ought not to be let in to controvert such proof. It is true, that if this testimony had been let in, it could have no weight in controverting the fact of the cutting, even had it been favorable to the appellant, and were this the object of this testimony, we might well conclude that

the exclusion of it resulted in no prejudice to the appellant. But this was not the object of it. It was evidently intended, by this testimony, to rebut the presumption of malice on the part of the appellant. It was certainly admissible for this purpose. The prisoner and the deceased had been quarreling about half an hour before the wound was given; they had been quarreling near and at the time the wound was given, and the wound was inflicted with a pocket-knife. Such testimony was, therefore, very properly admissible to show a want of malice, at least to show a want of malice sufficient for murder. It should have been admitted, but with such instructions on the part of the court as to the character of such evidence as would guard the jury from being misled by it or giving it too much weight. The exclusion of this testimony was, therefore, a gross error. The fourth reason for the motion for a new trial is, that the jury were permitted to go into a drinking saloon and drink spirituous liquors during their deliberations. This is supported by affidavits, from which it appears that the jury visited a drinking saloon during their deliberations in the case, where they, or most of them, took a drink of spirituous liquor, the sheriff being with them and paying for the drinks. It does not appear that in consequence of this, the prisoner did not receive a "fair and impartial trial," and, therefore, it furnishes no valid reason for a new trial. This conduct, nevertheless, was very reprehensible on the part of the jurymen guilty of it, and especially on the part of the sheriff, and they should have been severely punished by the court.

The fifth reason for a motion for a new trial is, that the jury were permitted to separate during the trial. This also is supported by affidavits, from which it appears that on the several occasions when the jury were taking refreshments at the hotel, two of them, being colored men, were accommodated apart and in a different room from the others; but they were all under the charge of an officer. This was in no respect such a separation as provided against by the law, and no prejudice could be presumed to have resulted to the appellant thereby.

For the single error we have pointed out, which relates to the exclusion of evidence of good character, we must reverse the judgment of the court below, and the cause must be remanded for another trial.

Not
son ac
is lang
homici
unless
time of
enable
assault
author
In C
where
render
rule is
upon t
procur
perform
althou
If an d
a surge
skill, a
by the
inflicte
In S
care, a
langun
that is
within
or man
the res
had ta
aggrav
In B
ing, or
they co
that th
surgeo
ing, "
of whi
the th
resulti
311, in

NOTE.—There is no homicide unless death results from the act of the person accused. Therefore, if A inflicts upon B a mortal wound, and while B is languishing, C kills him by an independent act, A is not guilty of the homicide: *State v. Seales*, 5 Jones (N. C.), L., 115. And there is no homicide unless death results from the unlawful act within a year and a day from the time of its commission. But as to just what instructions are to be given to enable the jury to determine whether death is the result of the unlawful assault to such a degree as to render the accused guilty of homicide, the authorities are not agreed.

In *Coffman v. Com.*, 10 Bush. (Ky.), 495 (S. C., 1 Am. Crim. Rep., 293), where a surgical operation was performed upon the deceased, supposed to be rendered necessary on account of the wound inflicted by the prisoner, the rule is stated as follows: "In cases of homicide, if an operation is performed upon the deceased, such as an ordinarily prudent and skillful surgeon to be procured in the neighborhood would deem necessary, and such operation is performed with ordinary skill, the respondent is responsible for the death, although the operation and not the wound made by him caused the death. If an operation is performed such as would not be deemed necessary by such a surgeon, or if it was deemed necessary and not performed with ordinary skill, and death results from the operation, and not from the wound inflicted by the defendant, the respondent ought to be acquitted, even though the injuries inflicted by him might eventually have proved fatal."

In *State v. Bentley*, 44 Conn., 537, the authorities are collected with some care, and from them the Supreme Court educes and lays down the rule in this language: "If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offense, either of murder or manslaughter, as the case may be, and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death."

In *Broven v. State*, 38 Tex., 482, it was held that the trial court erred in refusing, on the application of counsel for the respondent, to charge the jury, that they could not find the prisoner guilty of murder unless they were satisfied that the deceased died from the wound, and not from the malpractice of the surgeon. But this decision is based upon the Texas statutes, the court saying, "Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held guilty, upon the theory that without the first injury no other would have followed, as resulting from the first." See also 10 Nev., 106; 2 Tex. App., 271; 53 Ind., 311, in which latter many authorities are collected.

STATE V. WINTHROP.

(48 Iowa, 519.)

HOMICIDE: *New-born infant—Independent life.*

An infant, although fully delivered, cannot be considered in law a human being and the subject of homicide until life, independent of the mother, exists; and the life of the infant is not independent, in the eyes of the law, until an independent circulation has become established.

ADAMS, J. The defendant is a physician, and was employed by one Roxia Clayton to attend her in child-birth. The child died. The defendant is charged with producing its death. Evidence was introduced by the state tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instruction: "To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not."

The court refused to give this instruction, and gave the following:

"If the child is fully delivered from the body of the mother, while the after-birth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or not, or an independent circulation has been established or not, it is a human being, on which the crime of murder may be perpetrated."

The giving of this instruction, and the refusal to instruct as asked, are assigned as error.

The court below seems to have assumed that a child may have independent life, without respiration and independent circulation. The idea of the court seems to have been that the life which the child lives between the time of its birth and the time of the establishment of respiration and independent circulation is an independent life; yet, the position taken by the attorney-general, in his argument in behalf of the state, is fundamentally dif-

ferent. He says: "It will probably not be contended that independent life can exist without independent circulation, and hence the existence of the former necessarily presumes the existence of the latter, and so other or further proof is unnecessary." He further says: "The instruction complained of amounts to nothing more than the statement that, if the child had an independent life, then it was necessary to establish these facts upon which the existence of life necessarily depends." If such was the meaning of the court below, the language used to express it was very unfortunate. The court said that, if the child had independent life, it is no matter whether an independent circulation had been established or not. The attorney-general says that if the child had independent life, it had independent circulation, of course. But whether we take the one view or the other, we think the instruction was wrong. We will consider first the view that independent life and independent circulation necessarily co-exist, and examine the instruction as though that were conceded.

It follows that, where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life, under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that—it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the attorney-general's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, consisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child

have an independent life, while its circulation is still dependent on the mother? There are two senses in which the word independence may be used. There is actual independence, and there is potential independence. A child is actually independent of its father when it is earning its own living; it is potentially independent when it is capable of earning its own living.

We think the court below used the word independent in the latter sense. While the blood of the child circulates through the *placenta*, it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother: Wharton & Stille's Medical Jurisprudence, vol. 2, sec. 128. It has no occasion, during that period, to breathe through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of establishing independent respiration and independent circulation. Children, it seems, oftentimes do not breathe immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation, and the circulation was independent. Whether it had inappreciable respiration, or was in the condition of a person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources, antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true, that after a child is born, it can no longer be called a *fœtus*, according to the ordinary meaning of that word. Beek says, however, in his Medical Juris., vol. 1, 498: "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *fœtus in utero*. It lives merely because the *fœtal* circulation is still going on. In this

case none of the organs undergo any change." Casper says, in his *Forensic Medicine*, vol. 3, 33: "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent of the mother, without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fetal* life and the new life which succeeds upon the establishment of respiration and independent circulation. If we turn from the treatise on Medical Jurisprudence to the reported decisions, we find this difference, which is so emphasized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In *Rex v. Enoch*, 5 C. & P., 539, Mr. Justice J. Parke said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In *Regina v. Tritloe*, 1 Carrington & Marshman, 650, Erskine, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner willfully and of malice aforethought strangled the child after it had been so produced, and while it was alive, and while it had independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." See, also, *Greenleaf on Ev.*, vol. 3, sec. 136. It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder. The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

STATE v. BOHAN. *

(15 Kas., 407.)

HOMICIDE: *Dying declarations—Change of venue.*

On the trial of a case where it appeared that two persons were killed by the prisoner at the same time and under the same circumstances, one of whom died instantly and the other survived a few hours, the prisoner being on trial for the murder of the one who died instantly, it was held error to admit in evidence the dying declarations of the one who survived a few hours, his death not being the subject of the charge.

It is not error to refuse a change of venue on the ground of prejudice in the community, where the *prima facie* case made by the affidavits filed by the respondent is fully answered and clearly overcome by the affidavits filed in reply by the state.

KINGMAN, C. J. The appellant was tried for the murder of Thomas Anderson, and found guilty of murder in the second degree, and brings the case to this court by appeal. In the argument attention is called to two errors of the court below. These alleged errors are, first, in not granting the motion for a change of venue, and second, in admitting the so-called dying declaration of William N. Anderson in evidence.

Did the court err in refusing to order a change of venue? The application was supported by the affidavits of the appellant, the sheriff, and the acting jailor of the county. These affidavits made out a *prima facie* case for removal, but the state read a great number (over ninety) of affidavits, from citizens of each of the townships of the county, abundantly showing that there was no such state of feeling generally prevailing throughout the county as would prevent the accused from having a fair and impartial trial therein, or would even make it difficult to obtain an impartial jury for the trial. Outside the village of Brookville, where the accused and the deceased had resided and been generally known, there seems to have been no more feeling than usually prevails in any community where there is a homicide. Two lives were taken by violence. The better feelings of men were shocked by the event. Some intemperance of expression may be expected in such cases from men; but it is obvious that while that feeling existed, it created no strong prejudice against the accused. The extracts from the two papers at Salina, while they in several important respects stated the facts more harshly

against the accused than the testimony justified, yet they at the same time cautioned their readers that the statements made were gathered from reports, and must not be considered as reliable, and that it was the duty of all to wait till the case was heard before forming their opinions. With this caution before the reader, the mistakes as to the facts would hardly create a prejudice against the accused in the minds of fair men. There were articles in the Brookville paper strongly tending to inflame the public mind and, perhaps, so intended, but that paper had little circulation in the county outside of Brookville, and in several of the townships was not known at all. Following the decision in the case of *The State v. Horne*, 9 Kas., 119, we are of the opinion that there was no error in refusing a change of venue.

Was there error in admitting the dying declaration of William N. Anderson? It is so urged on various grounds, the principal of which are these: because the preliminary proof did not sufficiently show that the person making the declaration was certain that the hand of death was on him; that he was not in possession of sound mental faculties at the time such declaration was made; that all the declarant said was not reduced to writing, but only that part that the writer deemed relevant; and chiefly, because the dying declaration of William N. Anderson, made hours after the death of Thomas Anderson, is not competent evidence against the accused upon his trial on an information for the murder of Thomas Anderson only. As our conclusion on the last point suggested is decisive in the case, the consideration of the other points may be waived, especially as their decision depends upon questions of fact raised upon the record, rather than upon controverted points of law. The facts of the case bearing upon the question under consideration are substantially these: A little before four o'clock A. M., on the 3d of November, 1874, the appellant shot Thomas Anderson and William N. Anderson. The shots (four in number) were in rapid succession, but a brief time intervening between the first and last shots. Of the wounds then inflicted, Thomas Anderson died almost instantly, without uttering a word. William N. Anderson lived about seventeen hours, and some time about noon made the statement admitted as a dying declaration. The appellant was tried on an information for the murder of Thomas Anderson only. On these facts the question arises, can the dying declaration of one person be received as proof of guilt against a party charged with murder-

ing some other person? In *The State v. Medlicott*, 9 Kas., 283, the rule on this point was thus stated: "Such declarations therefore are admissible only when the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration." In that case the question involved was, whether the deceased was in the full belief that he was *in articulo mortis* when he made the declaration; and the attention of the court was mainly directed to that question, and the part quoted need not have been stated. The court, therefore, feels no such embarrassment on account of what was said in that case as will interfere with a full examination of the question now. In 1 Phillips on Ev., 287, the rule is laid down thus: "Such declarations are generally admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of the death are the subject of the dying declaration." And to the same effect the rule is laid down in the decisions generally. In a note to section 156, 1 Greenl. on Ev., Mr. Redfield states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished, and that a misapprehension of the true grounds on which such testimony can be received has sometimes led courts into error, as in England, where, at one time, such declarations were admitted in other than murder cases. But these decisions have been overruled as not correctly stating the law. The admission of this kind of testimony is an exception to the general rule that excludes hearsay testimony. Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness of his crime, beyond the power of the court by killing him, shall not thereby escape the consequences of his crime.

On no other ground can the admission of such testimony be justified. It is true that sometimes courts have given, as the reasons for its admission, some of those limitations that have been established as safeguards to prevent the rule from being abused. Such statements are not sound, and are likely to lead to confusion, and in some they undoubtedly have done so. Necessity, then, being the only ground on which such testimony can be admitted, it remains to be seen whether that necessity exists so generally, or to so great an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify

the ac
sugge
a mur
not a
and i
know
made
but t
other
No
dence
not to
except
as dif
at or
sion o
of the
witness
tion
accus
of W
der a
exten
break
and e
and i
whol
out t
is all
State
La. 2
was
ity,
cases
estab
is gi
lows
cour
abun
othe
trati

the adoption of a rule admitting such testimony. Cases may be suggested where the necessity appears to be strong. Thus, where a murder is committed, and a material witness of the crime, but not affected by it, and by whom alone it can be proved, is dying and in that hour makes a declaration of the facts which he knows and which took place months before. This declaration is made under circumstances equivalent to the sanction of an oath; but the accused cannot cross-examine, cannot call attention to other material facts not thought of by the declarant.

No one will contend that this declaration can be given in evidence. The necessity exists, but it applies to a single case, and not to a class of cases, and therefore should not be made an exception to the rule excluding hearsay testimony. It would be as difficult to suggest a case where, as in this, two men are killed at or near the same time, that any necessity exists for the admission of the statement of the one whose death was not the subject of the inquiry, as it is in any other criminal case where a material witness is dead. This case is a fair illustration. If the declaration of William N. Anderson was necessary to convict the accused, then it could have been used on the trial for the murder of William N. Anderson. The accused was as guilty of his murder as of that of Thomas. There is, then, no necessity for extending the exception further than has already been done. Once break down the barriers established by the wisdom of our law, and extend the exception beyond the reason that permitted it, and it would let in a most dangerous species of evidence in a whole class of cases. The great weight of authority will bear out the rule as laid down in *The State v. Medlicott*. And reason is all in favor of holding the rule as there stated. In the case of *State v. Terrill*, 12 Rich. (S. C.), 321, and of *State v. Wilson*, 23 La. An., 558, which greatly resemble this case, such evidence was admitted. The cases do not in our judgment rest on authority, and no satisfactory reasons are given for the ruling. These cases stand alone in this country, and we prefer to adhere to well-established rules rather than follow decisions for which no reason is given, and which seem dangerous in their tendency. It follows that the evidence was improperly admitted. The learned counsel for the state, however, suggests that the case was abundantly made out in every particular against the appellant by other evidence. This may be so, and if so, it is a striking illustration of how unnecessary it was to introduce the dying declara-

tion in this case. But what effect this evidence had upon the jury, and what effect the other evidence had, it is not the province of this court to decide; nor has it the means of doing so. The evidence was admitted after a long struggle, and may well have had more influence upon the jury than it would have upon this court. The evidence was vital, and as it was improperly admitted, the judgment must be reversed and a new trial ordered.

All the justices concurring.

COLLINS V. COMMONWEALTH.

(12 Bush. (Ky.), 271.)

HOMICIDE: *Dying declarations — Respondent procuring absence of Commonwealth's witnesses — Testimony of absent witness on former trial.*

Dying declarations can only be admitted in evidence when they relate to the act of killing, and the circumstances immediately attending it, and forming part of the *res gestæ*.

Where the fact of the killing was practically admitted, it was held error to admit dying declarations which were in substance as follows: "Michael Collins killed me, and killed me for nothing," and, "I never carried anything to hurt any one."

The prosecution have a right to give in evidence against the respondent that he participated in making arrangements for one of the commonwealth's witnesses to leave the place at which the trial was in progress.

It is only when a witness is dead that his evidence given on the first trial of a criminal case can be proved on the second trial of the same case. The fact that he is out of the state, and his residence unknown at the time of the second trial, does not make his former testimony competent.

LINDSAY, C. J. It is by no means clear that the deceased made the statements allowed to be proved as dying declarations under a sense of impending dissolution. But if they were provable in that regard, they ought to have been excluded from the jury for another reason. They were, in substance, "That Michael Collins killed me, and killed me for nothing;" that "I never carried any thing to hurt any one."

In the case of *Leiber v. The Commonwealth*, 9 Bush, 11, this court held the decided weight of authority to be, that it is a general rule that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the

declarations
the gro
to the a
ing it
unneces
lish the
was abu
was vi
stateme
the ex
1 Tayl
The
thing
killing
Proof
of the
gestæ.
prejud
We
cution
arrang
the pl
circum
flight
Law. 7
The
prove
trial.
reside
make
testim
action
proof
not ac
mit ei
ments
the st
In th
was d
ter is
sectio

declarations, and that such evidence should be admitted only upon the ground of necessity and public policy, and should be restricted to the act of killing, and the circumstances immediately attending it and forming part of the *res gestæ*. In this case, it was unnecessary to prove the declarations of the deceased to establish the fact that the killing was done by the accused. That fact was abundantly proved by several uncontradicted witnesses, and was virtually admitted by the line of defense adopted. The statement that Collins killed the deceased "for nothing" was but the expression of an opinion, and was clearly inadmissible: 1 Taylor on Evidence, p. 644.

The statement that he (the deceased) "had never carried any thing to hurt any one," did not relate directly to the act of killing, and was not a circumstance immediately connected with it. Proof of this statement was, therefore, inadmissible. Neither of the two statements proved anything forming part of the *res gestæ*. They were each incompetent, and they each tended to prejudice the rights of the accused.

We can not say the court below erred in permitting the prosecution to prove that the appellant had participated in making arrangements for one of the commonwealth's witnesses to leave the place at which the trial was in progress. That fact was a circumstance the jury might consider, just as in similar cases the flight of the accused may be considered: Wharton's Am. Crim. Law, 714, 722.

The appellant can not complain that he was not permitted to prove the statements made by the witness Duncan on a former trial. The witness was absent from the state, and his place of residence was unknown; but these facts did not entitle him to make the proposed proof. Whatever may be the rule as to the testimony given by an absent witness on a former trial in a civil action, it can not be proved on a criminal trial. The courts allow proof of such testimony when the witness is dead, but we are not advised that the rule has ever been extended so far as to permit either the commonwealth or the accused to prove the statements of a witness upon the sole ground that he was absent from the state, and beyond the territorial jurisdiction of the court. In the case of the *People v. Newman*, 5 Hill N. Y., 296, it was directly decided that in a criminal case proof of this character is inadmissible. The fact that the legislature, by the 154th section of the criminal code of practice, provides means by

which a party charged with crime may preserve the evidence of a witness whose death is apprehended, and then provides that the evidence so preserved may be used upon the death of the witness, and in no other case, seems to indicate the legislative intent that the rule in force as to absent witnesses at the time of the adoption of the code, should not be abrogated or modified. While the courts are not absolutely bound by this seeming intention, it is at least worthy of consideration, when we are asked to make an innovation upon what appears to be an established rule of practice.

We regard the instructions given in this case as altogether unobjectionable. For the single error in the admission of incompetent evidence, the judgment of conviction is reserved, and the cause remanded for a new trial upon principles not inconsistent with this opinion.

NOTE.—*Reynolds v. United States*, 8 Otto, 145, was a prosecution for polygamy in the U. S. district court, sitting in Utah. Evidence was given on the trial to show that a witness who testified on a former trial against the defendant for the same offense, but on a different indictment had been kept away from the trial by the defendant. Her evidence on the former trial was held admissible, and this was sustained by the Supreme Court of the United States. On this point Ch. J. Waite, who delivered the opinion of the court says: "The constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that he has kept away. The constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witness away, he can not insist on his privilege." To the same effect is *Williams v. State*, 19 Geo., 403. For decisions to a contrary effect, and in harmony with the main case, see *Bergen v. People*, 17 Ill., 426; *People v. Newman*, 5 Hill (N. Y.), 295; *Finn v. Com.*, 5 Rand. (Va.), 701; *Bragg v. Com.*, 10 Gratt. (Va.), 722.

PISTORIUS V. COMMONWEALTH.

(84 Pa. St., 158.)

HOMICIDE: *Self-defense — Charge to jury.*

An instruction to the jury from which they might infer that the prisoner was guilty of murder in the first degree, if he fired with a willful, deliberate and premeditated intent to take life, even though the defendant had a reasonable belief of bodily harm, and acting on that belief and apprehension of danger fired the fatal shot, is erroneous.

Marc
PAXON,
Error
county.
Indic
Jaquett
Blasi
living w
the dec
farms.
Jaquett
the cre
rius. 7
the two
Jaquett
to the
tree, bu
he start
some b
some b
after J
started
Blasius
remark
bank."
Jaquet
keeping
Jaquet
alone v
The pu
lad and
him ar
up the
tol dov
prison
closely
from
was r
and fi
threw
into t

March 12th, 1877. Before AG. EW, C. J., MERCUR, GORDON, PAXON, WOODWARD and STERRETT, JJ. SHARSWOOD, J., absent.

Error to the court of oyer and terminer of Montgomery county. Of July term, 1876, No. 40.

Indictment of Blasius Pistorius for the murder of Isaac Jaquette.

Blasius Pistorius, who had recently come from Germany, was living with his brother John, on a farm adjoining that of Jaquette, the deceased. A creek, called Stony Creek, separated the two farms. A difficulty had arisen between John Pistorius and Jaquette about the cows of the latter, which, in coming down to the creek to water, sometimes strayed upon the lands of Pistorius. This difficulty had occasioned considerable feeling between the two families. On the day of the homicide, the cows of Jaquette, in charge of a lad named Muloch, were driven as usual to the creek. While they were drinking, the lad sat under a tree, but perceiving that the cows were wandering up the creek, he started in pursuit, when the prisoner emerged from behind some bushes along the creek, and pointing his pistol and using some broken English, threatened to shoot. The boy then ran after Jaquette, who left the field where he was at work and started with the lad down to the creek. When they approached, Blasius pointed the pistol at Jaquette, who picked up two stones, remarking, "if you attempt to shoot me, I'll put you off that bank." They were at this time on opposite sides of the creek. Jaquette then walked to the other side of the creek, Blasius still keeping the pistol pointed at him. As he crossed the creek, Jaquette made some remark like, "Why can't you leave my cows alone when I leave them out to water on my own ground?" The prisoner still pointing the pistol at him, Jaquette said to the lad and a little girl who was near by, "You see that; I will have him arrested." Jaquette then threw down the stones and walked up the bank towards the prisoner, who at this time had the pistol down by his side. When he was about four feet from the prisoner, the latter again raised the pistol. Jaquette approached closer, and as he did throw up his arm to knock away the pistol from his face, but did not touch it. When the arm of Jaquette was raised the pistol was turned, presented at Jaquette's body and fired, the prisoner having his hand on the trigger. Jaquette threw up his arms, exclaiming he was killed, and fell backwards into the creek. When requested to help carry Jaquette out of

the sun, the prisoner replied, "No, let him lay there and die." The only questions passed upon by this court were those raised by the following points submitted by the prisoner, and the answers of the court thereto :

"3. If the jury find that the defendant fired the pistol when he was assaulted by the deceased, under apprehension of bodily harm, he cannot be convicted of murder in the first degree."

Answer. "This is true, unless the prisoner, at the time he fired, had a willful, deliberate and premeditated intention to take the life of the deceased, and the pistol was not intended for defensive purposes."

"4. If the defendant, although in no imminent peril when the deceased approached him, yet had a reasonable belief of bodily harm, founded upon the manner, gestures or appearance of the deceased, immediately before he fired the pistol, he cannot be convicted of murder in the first degree."

Answer. "This is true, unless the prisoner fired with the willful, deliberate and premeditated intent to take the life of the deceased, and not for the purpose of self-defense."

"6. If the jury find that the deceased approached the defendant in a threatening manner, and the defendant had a reasonable belief of bodily harm, although mistaken, he cannot be convicted of murder in the first degree."

Answer. "This is true, if you believe the prisoner acted upon that apprehension, but it is not true, if you find, beyond all reasonable doubt, he fired with a willful, deliberate and premeditated intent to take life."

The result of the trial was a verdict of murder in the first degree, and the prisoner was sentenced to death. This writ was then taken and the errors assigned, *inter alia*, were the foregoing answers to defendant's points.

George W. Rogers, Stephen S. Remak and James Boyd, for plaintiff in error.

Commonwealth v. Dunn, 8 P. F. Smith, 17; *Murray v. Commonwealth*, 29 *Id.*, 317; *Kelly v. Commonwealth*, 1 Grant, 484, were authorities for the points submitted by defendant.

If the killing was done when the prisoner was assaulted, and he apprehended bodily harm (as assumed by the third point), or he had a belief, founded upon the manner, gestures or appearance of the assailant (as assumed by the fourth point), how could there be that willful, deliberate and premeditated intention

to kill
sistent
pistol v
able h
defend
defens
murder
It mig
slaught
the cou
der in

Jaco
for the

Mr.
10th, 1
his bro
trials v
ing bec
witness
The ob
compla
counse
band o
of erro
much
tion p
terial,
and ac
compe

The
ations
of the
prison
The
based
jury t
convic
that w
which
and th

to kill referred to in the answer of the court? They are inconsistent and could not exist at the time. Both points aver that the pistol was fired under apprehension of bodily harm, or a reasonable belief thereof, yet the answers of the court require the defendant to prove that, because death ensued, he did it in self-defense, and if he failed in this, the verdict against him must be murder in the first degree. This certainly cannot be the law. It might possibly be either murder in the second degree or manslaughter, but both of these degrees of homicide are ignored by the court, and the jury are left to convict the prisoner of murder in the first degree, or acquit him entirely.

Jacob V. Gotwalts, district attorney, and *George N. Corson*, for the commonwealth.

Mr. JUSTICE STERRETT delivered the opinion of the court, May 10th, 1877. The indictment charged the plaintiff in error and his brother jointly with the murder of Isaac Jaquette. Separate trials were awarded, and the case against Blasius Pistorius having been taken up first, the wife of the brother was called as a witness in his behalf and was objected to by the commonwealth. The objection was sustained, and the exclusion of the witness is complained of. During the argument before us, it was stated by counsel for the plaintiff in error, that John Pistorius, the husband of the witness, had been tried and acquitted, since the writ of error in this case was taken. In view of this fact, and inasmuch as the judgment is reversed on another ground, the question presented by this assignment of error has become immaterial, and it is therefore unnecessary to consider it. The trial and acquittal of the husband has removed all objection to the competency of the wife.

The second, third and fourth assignments relate to the explanations or qualifications which the court added to their affirmance of the third, fourth and sixth points, submitted by one of the prisoner's counsel.

These points refer to the same general subject, and are each based upon a hypothetical state of facts, which, if found by the jury to be true, would, it is claimed, relieve the prisoner from a conviction of murder of the first degree; and the complaint is, that while each of them was affirmed, an explanation was added which had a tendency to confuse, and, perhaps, mislead the jury; and thus, to some extent, deprived the defendant of the benefit of

the affirmance. The instruction asked in the sixth point was: "If the jury find that the deceased approached the defendant in a threatening manner, and the defendant had a reasonable belief of bodily harm, although mistaken, he cannot be convicted of murder of the first degree."

The answer of the learned judge was: "This is true, if you believe the prisoner acted on that apprehension;" and, in the same sentence he added, "but it is not true, if you find, beyond all reasonable doubt, that he fired with a willful, deliberate and premeditated intent to take life."

The point, as presented, was incomplete, and might have been refused, but the court thought proper to affirm it with the qualification contained in the first clause of the answer, and said to the jury that it was correct if they found that the prisoner acted on the apprehension of bodily harm. There can be no reason to complain of this qualification, which, in itself, was quite proper. The facts, then, necessary to be found by the jury, in order to sustain the proposition, as qualified and affirmed by the court, were that the deceased approached the prisoner in a threatening manner—that the latter had a reasonable belief that he was in danger of bodily harm, and that, acting on that belief and apprehension of danger, he fired the fatal shot. If they found these facts to be true, the effect of the instruction would be to relieve the defendant from a conviction of murder of the first degree; but, what was added by the court, in saying it was not true if "he fired with a willful, deliberate and premeditated intent to take life," was liable to be misunderstood by the jury. They might understand it to mean that although they found all the facts embodied in the proposition as affirmed by the court, still, if they found, in addition thereto, that the defendant intended to kill, they should convict him of murder of the first degree; or, at least, would be justifiable in doing so. The proposition, as affirmed, presented a state of facts which, if ascertained to be true by the jury, excluded a conviction of murder of the first degree, but left them free to find a lower grade of homicide, if they thought that, under the circumstances as they really were, or as they reasonably appeared to the prisoner to be, there was no occasion to take life in order to save his own, or to avert great bodily harm; but, being told in the same connection, that the proposition was not true if he intended to kill, the jury might

think, if they found this intention, that it was their duty to convict of murder of the first degree.

The answers to the third and fourth points are not entirely free from a similar objection.

The idea intended to be conveyed by the learned judge, in answering all these points, was no doubt correct, but, owing to the manner in which it was expressed in the hurry of trial, the jury, in our judgment, may have been misled into the belief that if the prisoner intended to kill, he should be convicted of murder of the first degree, notwithstanding they were satisfied that he was assaulted, and fired "under apprehension of bodily harm," or had a reasonable belief of danger, "founded on the manner, gestures and appearance of the deceased." If he was assaulted, and was actually in danger of great bodily harm, or if it reasonably appeared to him that he was, and the danger, either real or apparent, was so great that it could not be averted without taking the life of his assailant, he would be excusable, under the law of self-defense, in doing so, in order to save his own life or avert great bodily harm. But, under the state of facts embodied in the points, the entire acquittal of the defendant was not asked. It was not contended that he was wholly excusable on the ground of self-defense. It was simply claimed that if the facts stated in the points were found to be true, he should not be convicted of murder of the first degree, leaving it to the jury, under the instruction of the court, to find a lower degree of homicide if they thought the evidence justified it.

In what has been said, we do not wish to be understood as intimating that, in answering points, the court should simply affirm or negative them. Hypothetical propositions are sometimes presented to the court, quite correct in themselves, but so artfully drawn that a naked affirmance might not enable the jury to comprehend their bearing. Others, again, are not strictly correct, and require qualification. In such cases it is the undoubted right, and frequently the duty, of the court, in answering, to give such explanations or qualifications as may be necessary to enable the jury to understand them. Sometimes this may be best done by presenting to the jury an alternative proposition, or suggesting to them, in connection with the answer, another or different theory or state of facts arising out of the evidence, and instructing them as to the law and their duty, in case they find them to be true.

The remaining assignments of error are not sustained, and there is nothing in any of them requiring special notice.

With the exception of the answers to the points already noticed, the learned judge presented the case very clearly and fairly in his charge to the jury; but, for the reasons already given, we are of opinion that the case should be sent back for a new trial.

The judgment of the court of oyer and terminer is reversed, and a *venire facias de novo* awarded; and it is ordered that the record be remitted to said court for another trial.

CARROLL V. COMMONWEALTH.

(84 Pa. St., 107.)

HOMICIDE: "*Molly Maguires*"—Continuance of trial after end of term—Evidence of motive—Order of proof.

Where a jury is sworn in a criminal case on the last day of term, the court has power to continue the trial from day to day after the term until it is terminated.

In a trial for homicide, any evidence which fairly tends to prove a conspiracy between the persons to commit murder, and a motive for the murder, is admissible, although not tending directly to prove the murder charged, in a case where such testimony tends to corroborate and render more credible the testimony tending directly to prove the murder charged.

The order in which evidence shall be given is within the discretion of the trial court, and evidence which is incompetent when admitted, will not be a ground for reversal, if it is afterwards made competent, by its connection with evidence given at a later stage of the trial.

March 13th, 1877. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and STERRETT, JJ.

Error to the oyer and terminer of Schuylkill county. Of January term, 1877, No. 12.

Indictment of James Carroll, James Boyle, Hugh McGehan and James Roarity, for the murder of Benjamin F. Yost.

At about two o'clock of the morning of July 6th, 1875, Yost, a policeman in the borough of Tamaqua, Schuylkill county, was fatally shot while in the act of extinguishing a street lamp in the western end of Broad street, in said borough. While standing upon a ladder, in the act of turning off the gas, he was approached by two strangers, who, after discharging their pistols

and inflicting upon him a wound from the effects of which he soon after died, immediately fled in the direction from which they came. The assassins were not known at the time, and the authorities were unable to obtain any evidence that would justify the arrest of any one.

On September 3d, 1875, James Kerrigan, Michael Doyle and Edward Kelly were arrested and placed in the Carbon county jail, charged with the killing of John P. Jones, at Lansford, in said county. The prisoners having demanded separate trials, Michael Doyle was put upon trial at Mauch Chunk, in January, 1876, and during his trial, Kerrigan made a confession, in which he implicated Thomas Duffy, Hugh McGehan, James Carroll, James Roarity and James Boyle, with himself, in the murder of Benjamin F. Yost. These defendants were arrested in February and confined in the Schuylkill county jail, charged with the murder of Yost. Duffy having demanded a separate trial, Carroll, Boyle, McGehan and Roarity were put upon their trial in May, 1876, and after the case on the part of the commonwealth had closed, and while the prisoners were on their evidence, one of the jurors became ill and after a few days of sickness died. The eleven jurors were discharged. The case against the four prisoners was called again for trial on the 6th of July, 1876.

The killing of Yost was not participated in by all of the defendants, but it was alleged that the act itself was committed by McGehan and Boyle, while Carroll and Roarity were charged as accessories before the fact. Yost made a dying declaration, in which he stated that his assailants were unknown to him by name, but that he had seen them the evening previous to the shooting in the saloon of James Carroll, one of the defendants.

The trial was held before PERSHING, P. J., and WALKER, A. L. J. When the case was called, the trial of Thomas Munley, for the killing of Thomas Sanger, was in progress in another court of oyer and terminer of the county, and the defendants objected to the calling of a jury at that time, and the commencement of the trial of their case during the trial of Munley, inasmuch as there had been no order for a separate court, and no separate *venires* for the holding of separate courts for the trial of cases in the oyer and terminer, as required by the acts of assembly.

The court overruled the objection, and stated that under the acts of assembly applying to Schuylkill county—act of 18th

March, 1875, Pamph. L., 25-28, and act of 7th of April, 1876, Pamph. L., 19, the holding of two courts at the same time was legal.

A jury having been impaneled in the case on Saturday, the 8th day of July, 1876, which was the last day of the term, an adjournment was had until the Monday following, and from day to day until the 13th of July, when the trial commencing, the prisoner objected to proceeding, on the ground that the term had expired, and that no precept had been issued to hold a court of oyer and terminer at that time, and the jury must, therefore, be discharged. The court overruled this objection, and the overruling of this and the foregoing objection, constituted the first assignment of error.

On the trial, the commonwealth called James Kerrigan, who had made the confession, implicating the prisoners, and admittedly an accomplice in the crime, who testified that he knew the prisoners, and had known Yost; that Duffy had had a difficulty with Yost, and been beaten by him the winter previous to the murder; that a short time before the killing of Yost, Duffy "told Roarity that he would give him \$10 for his trouble if he would shoot Yost, or put him out of the way," and that Roarity replied, "All right, I will, and if I don't do it, I will get two men who will do it;" that prior to this, a conversation was held in Carroll's bar-room, at which Duffy, Carroll and witness were present, in which Duffy said he would get Mickey Campbell to shoot Yost, and Carroll said, "You let that alone, we will get men who will do that; Mickey Campbell don't belong to the society and it may be found out;" that Roarity told witness he had Thomas Mulhall and Hugh McGehan picked out to shoot Yost; that on the 5th of July, 1875, three of the prisoners, Duffy and witness met in the kitchen of Carroll's house, Roarity having been called home by the sudden illness of his wife; that Carroll sent witness to procure the loan of a pistol; that upon inquiry, Duffy said, "I am going to shoot Yost to-night;" that either Boyle or McGehan also remarked that, "by God they had come three times to do this job, and they were not going back until they did it;" that McGehan had Roarity's pistol, and that Carroll gave Boyle a single-barreled pistol which he himself previously loaded, remarking, "that it was a poor thing to do a job like that;" that witness conducted McGehan and Boyle to the appointed place, and saw the killing of Yost; that both fired

shots, McGehan firing first; that as they fled together, McGehan said, "he had shot Yost, that he knew he had shot him;" that witness accompanied them a part of the way to Summit Hill, whence they came, and there gave them directions as to the course to pursue to reach that point; that in subsequent conversations with Boyle and McGehan, they had given him an account of the journey, and that they had not met any one but "Bob Breslin," whom they had accosted and asked for a drink of water. The witness also detailed what the prisoners had said with reference to their movements on the day following the murder, and what they had said to avoid suspicion, and to explain their whereabouts the day and night before the murder. The commonwealth then proposed to prove by this witness, "that there was at the date of the murder a secret or criminal association in this and adjoining counties, called the Ancient Order of Hibernians, commonly known as the 'Molly Maguires;' that all the prisoners now on trial, together with Thomas Duffy and the witness Kerrigan, were members of the order; that for the purpose of taking revenge on B. F. Yost, for the beating of Duffy, this association selected McGehan and Boyle to murder Yost, in consideration of the fact that other members of the society who desired the death of Yost were to select men to murder one John P. Jones, who was obnoxious to that branch of the association which furnished the men to kill Yost; that Roarity was a prominent officer of the association and active in the selection of the men to kill Yost, and that James Carroll was also a prominent officer of the association, and as such aided and abetted in the commission of the murder of Yost."

The prisoners objected, because,

1. The witness had already given the origin of the conspiracy which resulted in the death of Yost, and the mode and manner of its execution, in which there was no agency by or reference to any organization or society, and the evidence proposed is, therefore, contradictory of what the witness has already testified to.

2. The testimony is irrelevant, because it is not proposed to prove that the prisoners entered into the agreement made in the society in relation to the killing of Yost and Jones, or were present at the time such agreement was made.

3. The evidence proposed necessarily introduces into this case an independent offense. To corroborate Kerrigan several offers

were made by the commonwealth, the object of which was to trace the possession and establish the identity of the pistol used by Roarity, and thereby to confirm the statements of Kerrigan made in regard thereto; to prove that Kerrigan was met on the night of the 15th of July, on his return from Summit Hill, by one Churchill, whom he testified he had met, and to sustain various other statements made by him as to his whereabouts, at times whereof he had testified, and further to show by the mother of Robert Breslin, that her son Robert had returned to the house at or about the time it was alleged he had met McGehan and Boyle on the road to Summit Hill.

These offers were all objected to by the prisoners, on the ground that they did not tend to connect the defendants with the commission of the crime, and that it was not competent to corroborate the testimony of an accomplice as to matters which occurred subsequent to the murder.

The court overruled all these objections, and they constitute the assignments of error from four to nine inclusive.

The comments of the court upon the character of this testimony, and its bearing upon the case, will be found in the portions of the charge of the court hereinafter given.

The commonwealth then called James McParlan, who testified at length, that as a detective, but in the capacity of a private person, he became acquainted with the four prisoners on trial, and that three of them, McGehan, Carroll and Roarity, confessed to their participation in the murder of Yost, both as principals and accessories before the fact, and detailed to him the circumstances attending the commission of the crime, an account of which the witness gave. His statement in this regard sustained substantially that made by Kerrigan. The commonwealth then made the following offer:

To prove by the witness on the stand, James McParlan, that as a detective he came into Schuylkill county to become familiar with the working of a secret association, known generally in this locality as "Molly Maguires," but the real name of which is the Ancient Order of Hibernians; that he was initiated as a member of that organization; that Hugh McGehan, James Roarity and James Carroll, the three prisoners, whose declarations witness has testified to, were members of that order or association, known to be such to the witness at the time spoken of, and that they all knew him to be a member, and that it was a practice in this

organization, and known to be such to the above named prisoners, for the members to aid and assist each other in the commission of crimes, and in defeating detection and punishment; that said organization was a secret one, the members of which could make themselves known to each other by signs and passwords; that the declarations of the three prisoners above referred to were made to the witness by the prisoners as a fellow-member of their organization. "All this to be followed by proof that James Roarity was an officer of this organization, and undertook to furnish the men to murder Yost, and did actually furnish them, by selecting from the members of the organization the prisoner McGehan and one Mulhall, the latter of whom was afterwards substituted by James Boyle." "This was done at the request of Thomas Duffy, the prisoner who had been arrested by Yost for a previous offense, and who had threatened to be revenged on him (Yost) for the matter."

All this offer was,

- "1. To show the motives for the commission of the murder; and,
- "2. To explain the relations existing between the witness and the three first above named prisoners, and why the confessions and declarations already in evidence were made."

The defendants objected to the offer,

1. So far as it relates to and purposes to prove the existence of, and membership of the defendants Carroll, McGehan and Roarity in, the organization known as "Molly Maguires," as not material, and in no way tending to show the guilt of the defendants charged with the killing of Yost.
2. It is not alleged in the offer that the killing was done by the order, as such, or in any other capacity of those concerned in it.
3. It is not alleged that Duffy and Boyle are members of the society named, and, therefore, the offer to prove the existence of the association, and its relations to the parties named—Roarity, Carroll and McGehan—is not material upon the subject of the killing as an act of revenge for injuries done by the deceased to Duffy.
4. It is not material or relevant for the commonwealth to give evidence of the means employed to obtain confessions from the prisoners.
5. The threats of Duffy, who was not a member of this asso-

ciation, cannot, and do not, appear to have any relation to, nor connection with, the association mentioned, and such association is not material upon the subject of motive, as set out in the same.

6. The testimony is proposed to affect such of the defendants as are not claimed to be members thereof, and as such is irrelevant.

7. The offer is irrelevant, and not material to the charges contained in the indictments.

8. The commonwealth having produced upon the stand James Kerrigan, and proved by him the origin of the conspiracy which resulted in the death of B. F. Yost, and that the persons connected therewith acted upon their individual responsibility, and not as members of any organization, the evidence now proposed is a contradiction of the evidence of the said Kerrigan, and, therefore, incompetent.

9. That portion of the commonwealth's offer which relates to the proof of the practices of the Ancient Order of Hibernians, and the membership of the prisoners in that organization, does not propose to prove that the killing of Yost was the act of the association, or that they perpetrated the crime by reason of their membership of said association, or that the practices of said association refer to the particular case now on trial.

The court overruled these objections, which was the third assignment of error.

The witness then proceeded to give in detail an account of the organization, grips, passwords and practices of the order known as the Ancient Hibernians, or "Molly Maguires," showing that it was a secret organization, having its ramifications in England, Ireland and Scotland, and the various states of the Union, subdivided into state, county and district organizations, with their several officers, that of the district being termed a body-master; that the signs and passwords called "goods," were transmitted regularly from the head of the organization in Ireland to the various subdivisions through delegates at conventions; that it was the practice of the organization to assist in the commission of crimes, the design and execution of which were, in the language of the witness, as follows:

"As a general thing, when an outrage was to be committed, whether it was to kill a man, or beat him or burn his place down, or anything in that respect, the parties who wanted it done told the division master they wanted this thing done. The division master called the men together—probably it would not be a full

meeting—to talk the matter over, and see whether it was right that this man should be killed, or this place burned, or this man should be licked, as it might be. Then the division made a call upon some other division master, probably not living in the same county. There was no difference about that, but the men that were to perform this act, or commit this outrage, had to be men that were unknown, as a general rule, to the parties upon whom the outrage was to be committed. This division master, in turn, pledged himself to this other division master, upon whom he made the call, to furnish men if he wanted a favor in that line of business at any time that he would ask him to furnish men to do it; consequently the men were furnished and the job was done.

“If any of the members were arrested in the commission of any crime, the practice of the organization was to raise a fund, and to retain the best legal talent they could possibly get, and the next practice was the ‘*alibi*.’ Any members who refused to come forward and sustain the *alibi* when called upon were expelled, and just as like as not would be killed.”

The portions of the charge and answers to points following, constituted the assignments of error from the tenth to the fifteenth inclusive, and are given at length, in view of the fact that it was strenuously contended, on behalf of the prisoners, that the testimony therein commented upon was not such evidence as should be admitted to corroborate the testimony of an accomplice.

“10. It is a rule of evidence that the degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. Such testimony should be weighed with great caution. The jury may, if they see proper, act upon the evidence of an accomplice without any corroboration of his statements. It is usual for courts to advise juries not to convict a defendant of felony on the testimony of an accomplice alone, and without corroboration, and we so advise you in this case. You will carefully consider the other evidence in the case, and determine how far it confirms Kerrigan’s statements. The rule on this subject is thus laid down in ‘Joy on the Evidence of Accomplices,’ pp. 98, 99, as the result of an elaborate examination of the authorities. The confirmation ought to be in such and so many parts of the accomplice’s narrative as may reasonably satisfy the jury that he is telling the truth, without restricting the confirmation to any particular points, and

leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge.

"11. He, Kerrigan, then testifies to meeting there James Boyle, Thomas Duffy, Hugh McGehan and James Carroll, and says that these parties were in the kitchen, and he describes the different positions they occupied in the kitchen, and states further, they proceeded to the porch, and that Carroll came out and went up the street, and coming back, said, 'I could not get none,' and said he had been to John Herron's saloon and could not get none. Kerrigan testifies that this had reference to the procuring of a revolver, and that Carroll then gave him twenty-five cents and told him to go over to Patrick Nolan's and ask for the loan of a revolver for a man going to Summit Hill or Mauch Chunk. Kerrigan states that he went over to Nolan's and found nobody there but Nolan and his wife, and a man named Patrick Coleman. Kerrigan called Nolan into a side room and asked him for a revolver, and Nolan said he had none. He states that then they left this side room, and he treated the party, including Coleman, and there spent the twenty-five cents which had been given him by Carroll, and returned to Carroll's and found McGehan, Duffy and Boyle on the stoop, and he asked them what they wanted, and Duffy said, 'I'm going to have him (Yost) to-night.' The witness then says that he remonstrated with him against the killing of Yost, as he had had a difficulty with McCarron before, and he might be blamed for the murder. He then says that either McGehan or Boyle, and he cannot recollect which, spoke up and declared that he had come there three times to do this job, and they were not going back till they did it. He states that he saw McGehan in possession of Roarity's pistol; he states that there was a wrangle about the pistol, and that McGehan said he was all right, that he had Roarity's pistol, and he pulled it out, and the witness knew the pistol; that then Carroll went into the bar-room, went behind the counter, opened a drawer, took from it a little single-barreled pistol, a breech-loading one-shooter, and he there saw Carroll put in the bullet and hand the pistol to Boyle, saying, at the same time, that it was a poor thing for such a job, and that Boyle put it in his pocket.

"This is the most important evidence in connection with this case, and it is your duty to scan it carefully, and to see how far

it is corroborated by the other evidence. Kerrigan does locate Roarity there at this time, and the other testimony in the case is that Roarity was sick that afternoon. To contradict this testimony, Mrs. Catherine O'Donnell was called by the defense. She is the mother of Mrs. Carroll, and she testified that she was at Carroll's from six to twelve o'clock on the night of the 5th of July, 1875; that she was in the kitchen there all the time, and that these parties were not there, as testified by Kerrigan. She states that she saw Edward Herron there, and he testifies that he was there during part of this time, and went into the kitchen for a drink of water, and that he saw none of these parties there. There is corroboration of this statement in the testimony of Patrick Nolan, and there is a similarity of statement between Nolan and Kerrigan in every particular except one. Nolan testified that Kerrigan came to his house, rapped at the door, and that the door was opened by his wife, and Kerrigan came into the bar-room, where there was no person but himself, Nolan, and his wife and Patrick Coleman; that Kerrigan tapped him on the shoulder, and took him into another room, and there asked for the loan of a revolver to protect a man going to Summit Hill or Mauch Chunk, one of the two places; that he told Kerrigan he had none, and that Kerrigan then proposed to treat, and produced the twenty-five cents, and that he, Kerrigan and Nolan drank. Nolan alleges that he did not receive any money from Kerrigan, but that Kerrigan threw the money on the counter and he pushed it back to him. Whether Nolan took the money or not is the only discrepancy between his statement and Kerrigan's as to that part of the testimony. Kerrigan alleges that he spent the money there, and Nolan alleges that he declined to receive it. This, as far as we now recollect, is the corroboration of Kerrigan, and the contradiction of his testimony in relation to this conversation. This evidence is important as showing the connection of Carroll, at least, with this transaction in the preparation they had made for the killing of Yost, and showing, if you believe it, that he tried to procure a pistol, and failing to do so, furnished Boyle with the one-shooter, which he said was not sufficient for the purpose.

"12. Kerrigan testifies to other points, in which he is corroborated by other witnesses. He testifies that Barney McCarron fired two shots after the men as they ran in the direction of the cemetery, and that McGehan fired a shot in return. This is cor-

roborated by the testimony of Barney McCarron, and by the testimony of Yost, and other witnesses. One witness stated that four shots were fired, and others stated that they heard more than two. The testimony of Kerrigan, Yost and McCarron shows that there were about five shots fired at that time. Kerrigan then testifies to a conversation that he had with McGehan immediately after this shooting took place. He states that he said to McGehan, 'I know that you shot Yost, and he was not such a bad fellow. Barney McCarron is ten times worse.' McGehan said, 'I don't ask better sport than to put such men out of the way, but I don't like to draw an Irishman's blood.' McGehan said he did not know whether Yost would die or not, but he knew that he shot him. The witness, in giving his testimony, then comes down to the 1st of September, 1875, in which he alleges a conversation with McGehan, in which McGehan said they got home all right, and said he had told Doyle and Kelley that the road they took would be a good road for them to take when they shot Jones; that they did not meet anybody but Robert Breslin, and he was a dirty fellow, who had tried to get the men to work for the company, and he was afraid that Bob would squeal on them. Then he went on to state to Kerrigan all the details of a conversation that passed between them and Breslin; that they asked Breslin for a drink, and Breslin said that he had no water there, but if they would go to the house they could get some. McGehan said they told Breslin they had no time. Then Breslin asked them where they had been and what they were doing there at that time in the morning, and McGehan said he and Boyle had been to a ball at Mauch Chunk, and had got lost, and did not know where they were till they got there.

"The statement alleged to have been made by McGehan to Kerrigan is corroborated by the evidence of Robert Breslin, whose testimony on this point is very important. On this point you will judge how much Kerrigan is corroborated by what Breslin testified. You have heard the argument of the counsel upon this subject, and what was said in reference to Kerrigan's obtaining information. There is no evidence that he got it from Breslin, and you have heard the argument as to how he did get it, if he did not get it from McGehan. If it be true that McGehan made this statement to Kerrigan, then McGehan's

statement and the testimony of Breslin correspond in every particular, as far as we can see.

"Kerrigan also testifies that on this occasion, on Sunday, the 14th or 15th of July, he was in Alex. Campbell's house, and that there Roarity gave him that pistol for company on the road home. This was just after he had met Boyle at Campbell's, and he started for home about seven or eight o'clock in the evening, and he testified that on the road home he met Churchill and McLaughlin, and that he had possession of the pistol all that time, for five or six days. It is claimed, on the part of the commonwealth, that Kerrigan is corroborated here by the evidence of Churchill. Churchill, who is a mining boss, testified that on that day, the 14th or 15th of July, as nearly as he can fix it, he was in a buggy in company with McLaughlin, driving from Tamaqua towards his home, and that he met Kerrigan, whom he knew well, because Kerrigan had been in his employ, going on foot in the direction of Tamaqua. Churchill testifies further, that he had a conversation with him, and detailed to you what took place at that time. It is claimed by the counsel that Kerrigan's statement is corroborated by the statement of Churchill.

"13. It is claimed, also, that there are other corroborations of this statement of Kerrigan. He tells you he came home from work at six o'clock, about a week later than this, and that he found at his house James McKenna (or McParlan) and Patrick McNellis; that he washed, and all took supper together, and that on that occasion he gave this Roarity pistol, as it is called, to McNellis, for the purpose of having it delivered by McNellis to Roarity, and he testifies that McKenna at that time held the pistol in his hands and made some remarks about it. It is alleged that in this he is corroborated by McParlan, who testifies that he was at Kerrigan's house, I think, on the 27th of July, and that he did take supper there, and that the pistol was produced at the time by Kerrigan, and that he saw Kerrigan give it to McNellis to be delivered to Roarity, and that it was there that McParlan came to know this pistol.

"Kerrigan states that on the 1st of September he was present at McGehan's saloon, when Aleck Campbell, Michael Doyle, Edward Kelly, James Boyle and Hugh McGehan were there; that McGehan oiled the pistols, and that one of the cartridges was too long, and stuck out of the chamber, so that the chamber would not fit into the revolver, and that he took the chamber

out, struck the cap with his knife and the cartridge exploded, and the bullet went into the counter. He says that a man named Aubrey came in while they were there. It is alleged by the commonwealth that in this statement Kerrigan is corroborated by the testimony of Charles Walton and J. C. Williams, who have produced here a part of the counter, showing the hole in which this bullet penetrated.

"Kerrigan states that he next saw that pistol in Aleck Campbell's bar-room, where McGehan fetched the men to shoot Jones, between six and seven o'clock in the evening, and that there was no one there but Kelly, Campbell, McGehan, Doyle and himself, but that a man by the name of Goslee and a man by the name of Condon came into the bar-room, and that Condon had a coat of arms in India ink upon one of his arms, and showed it. He states that they had some drinks there with Goslee, and so had Doyle and Kelly, and that he next saw the pistols at Tamaqua, at the spring, after the killing of John P. Jones, when Doyle and Kelly were arrested for that murder along with Kerrigan. It is alleged, on the part of the commonwealth, that Kerrigan is corroborated in this part of his statement by the testimony of Goslee. It is in evidence that Goslee was present at Campbell's at this time, and Goslee testifies that Kerrigan was there, and Doyle was there with three or four men, and that he, Goslee, had an argument with Condon, and that Condon rolled up his sleeve and showed the India ink marks on his arm, a statement which goes to corroborate that which was made by Kerrigan as to Goslee's and Condon's being there, and the exhibition by Condon of the marks upon his arm. There is evidence called on the part of the defense to contradict this statement of Kerrigan.

"The evidence of Kerrigan is very important in this case. If you believe his statements, it will not be, perhaps, too much to say that they are sufficient to convict all these defendants. Therefore, you should scan it closely and determine how far he is corroborated in material parts of it, and how far he is contradicted. We have read the rule of law as to the extent of the corroboration required on the part of an accomplice, in order that a jury may give him credence."

14. The defendants' second point was, "That under the evidence in this case, James Carroll and James Roarity cannot be convicted as they are charged in this bill of indictment, as direct

principals, and under the testimony, if guilty of any offense, it is that of accessories before the fact to the felony."

The court said: "We refuse to answer this as requested. If you find, from this evidence, that James Carroll and Roarity counseled or aided or abetted the murder of Yost, that although they were not actually present when the crime was committed, they would be equally guilty with McGehan, if you believe that they actually committed the offense."

15. The defendants' fourth point was, "That the jury would not be justified in finding a verdict against the defendants upon the testimony of James Kerrigan, an accomplice in the murder of B. F. Yost, unless his testimony is corroborated in its material parts, which connects the prisoners with the killing of Yost. That a corroboration of Kerrigan in such collateral matters as may be consistent with the innocence of the prisoners, is no legal corroboration, and is insufficient."

Answer. "We say to you that the rule of law is, that a jury may convict on the evidence of an accomplice alone, if they believe it; but it is usual for the courts to say to the jury that they should not do it, and that they should have corroboration of his testimony before they would convict. We here say to you now, while it is the rule of law that a jury may convict on the evidence of an accomplice alone, that you ought not to convict upon the uncorroborated testimony of James Kerrigan in this case, as he is a confessed accomplice, and it will be your duty to examine his testimony, and see how far it is corroborated, and in order to determine what credence you will give to it. It should be such corroboration as will satisfy your minds of the truth of what he has stated, as we have already instructed you in the general charge (see portion of general charge under assignment 10, *ante*, page 113), to which we refer in connection with the answer to this point."

The jury brought in a verdict of murder in the first degree, and the prisoners were all sentenced to be hanged. They then took this writ, and the assignments of error, among others, were those heretofore noted, and as they are respectively numbered.

Lin Bartholomew and John W. Ryan, for plaintiffs in error.

The right to hold a jury after the expiration of the term seems to be founded in necessity, and to prevent a failure of justice; but no case has ever gone so far as to authorize a court to impanel a jury, or a number of juries, and keep them waiting until

required. A jury removed from the care and vigilance of the court may be subject to influences illy calculated to promote the cause of justice. If one jury may be selected under such circumstances, others may be, and in important trials, involving life and liberty, the prisoner may be deprived of the benefit of the regular panel from which to select a jury, and be obliged, as here, to select from talesmen, and the safeguard provided for him thus destroyed. See *Horton and Heil v. Miller*, 2 Wright, 270.

Before the offer contained in the second assignment was made, the witness Kerrigan had testified very fully as to the origin and extent of the arrangement to kill Yost, and had shown that the society known as the Ancient Order of Hibernians, as such, had nothing to do with it. The offer was to show the existence of this order in Schuylkill and other counties, and that as such an arrangement was made to kill Yost and John P. Jones. It was not proposed to show the presence of either of defendants at any meeting at which the subject was agreed upon, or that either knew of any such arrangement. While it may be conceded that a party joining a conspiracy at any stage before its completion, is responsible as a co-conspirator, it must be shown that he joined it, knowing its character and purpose, before he can be bound by the acts and declarations of others. Although the offer connects the prisoners with the killing of Yost, it does not even allege that either knew of or had anything to do with the killing of Jones.

The third assignment of error, *inter alia*, proposes to show that it was a practice in the organization known as Ancient Order of Hibernians, and by the persons known to be such, for the members to aid and assist each other in the commission of crimes, and in defeating detection and punishment. While the ostensible purpose of this offer was to show the motive for the commission of the murder, and the relations between the witness and prisoners, the real purpose, if regarded according to the effect of evidence, was to create prejudice in the minds of jurors already excited by systematic efforts to that end. The door was thrown wide open by the offer to show a general practice to aid and assist in the commission of crimes, and in the obstruction of justice, without one single allegation that either had anything to do with the offense then being tried. If a man be convicted upon the general principle that he is associated with those who

are accustomed to commit crime, this evidence was competent, but if it be still a legal truth that a party shall be informed of the nature of the accusation against him, and that the evidence shall be confined to the support of some specific charge, this offer was a most violent outrage upon the rights of these defendants. The limitation put upon the admission of this kind of evidence is fully stated in *Shaffner v. Commonwealth*, 22 P. F. Smith, 60.

The commonwealth offered what they called corroborative evidence of the testimony of Kerrigan, which is chiefly embraced in the propositions contained in the assignments from four to fifteen, exclusive of the ninth. Some of these corroborating circumstances to which importance is attached, relate to acts of Kerrigan which transpired some weeks after the killing of Yost, and were either of a private and lawful character, or connected with the killing of Jones. The commonwealth corroborates the witness upon points which are not in dispute, and which do not add one scintilla to the credit of the witness, and thence deduces the result, that, as he has told the truth about himself, therefore he has told the truth about the prisoners. Unless the law raises the legal presumption from such premises, the court was in error. The doctrine held by the court simply amounts to this, that if an accomplice in crime, who testifies to his own and the criminality of others, can bring to the stand some witness who can corroborate the fact of the witness's guilt, the accomplice is entitled to full credit. Judged as the law judges human motives by human actions, an accomplice in a high felony is unworthy of credit, and he gains no title to credit by evidence which simply tends to show his own guilt. Such is the drift of modern authorities: *Re v. Addis*, 6 C. and P., 388; *Re v. Wilkes*, 7 *Id.*, 271; *Re v. Morris*, *Id.*, 270; *Re v. Wells*, M. and M., 326; *Reg. v. Farler*, 8 C. and P., 106; *Reg. v. Dyke*, *Id.*, 261.

The ninth assignment raises the question whether a witness whose credit is not attacked by the cross-examination, or otherwise, can be corroborated by the party calling him in chief, in the manner sought to be done in this case. In support of the position that the court erred in admitting Mrs. Breslin's evidence, reference is made to the following cases: *Craig v. Craig*, 5 Rawle, 91; 1 Greenl. Evid., 469; *Commonwealth v. Wilson*, 1 Gray, 340; *Deshner v. Merchants' Ins. Co.*, 11 Mete., 199, 200.

George R. Raecher, district attorney, Guy E. Farquhar,

Franklin B. Gowen, Charles Albright and F. W. Hughes, for the commonwealth.

While the two cases were tried in the oyer and terminer, they were each tried by legal quorums of the judges. The jurors in the two cases were not drawn from the same panel, but each jury from a separate panel, summoned in pursuance of an order for separate *venires* for the respective weeks of 26th of June and 3d of July, 1876.

The court decided that it was proper to proceed with the trial, and it having been begun within the term, there existed no legal reason why the case should not proceed, though a conclusion was not reached till after the end of the term: *Lieb v. Commonwealth*, 9 Watts, 200; *Miller v. Wilson*, 12 Harris, 122; *Williams v. Commonwealth*, 5 Casey, 102; *Briceland v. Commonwealth*, 24 P. F. Smith, 463. See also the following acts of assembly: Act of 18th March, 1875, *Purd. Dig.*, 2054; Act 18th April, 1876, *Purd. Dig.*, 2028; Act 9th April, 1874, *Purd. Dig.*, 1886; Act 7th April, 1876, *Purd. Dig.*, 2066.

The testimony offered under the second and third assignments was to show the motive for the murder, and the relation of McParlan to the defendants at the time the confessions were made to him by Carroll, McGehan and Roarity. While the testimony, as it was before the court, showed the origin of the conspiracy in the malice and hatred of Thomas Duffy toward Yost, yet it failed to explain the readiness of the other defendants to enter into the conspiracy. But if the commonwealth could show, as it did, under the offer now under discussion, that all the defendants were members of a secret and criminal organization, whose general practice was to engage in the commission of crimes, and to aid and assist its members in escaping detection and punishment; that it was the practice of one division to aid other and distant divisions in avenging alleged injuries to its members; that the practice was for the body-master or president of a division to select the men to do the deed, and for the division which was thus favored, in its turn to furnish the men to commit any crime that might be required of them, in return for the favor; applying this practice to the facts of the case, have we not established an adequate motive on the part of the defendants, fully explaining their connection with the murder of Yost?

Where facts and circumstances amount to proof of another crime than that charged, and there is ground to believe that the

crime charged grew out of it, or was in any way caused by it, such facts and circumstances may be proved to show the *quo animo* of the accused: Whart. Crim. Law, 647-649; *Commonwealth v. Ferrigan*, 8 Wright, 388.

An accomplice is a competent witness. It is the province of the court to determine the competency of the witness; it is for the jury to determine upon the credibility of the witness. The rule, in regard to the testimony of an accomplice, does not extend further than to require of the judge to *advise* the jury not to convict on the uncorroborated testimony of an accomplice, and the court, in this case, so advised the jury in express terms. 1 Phil. Ev., 110, 116, 117; 1 Whart. Crim. L., § 785; 1 Greenl. Ev., § 380, 381; *Reg. v. Dunne*, 5 Cox C. C., 507; *Rex v. Barnard*, 1 C. and P., 88; *Rex v. Wilkes*, 7 *Id.*, 272; *Rex v. Hastings*, *Id.*, 153; *Reg. v. Stubbs*, Dearsley's C. C., 555. We have the testimony of an accomplice; first, to all the acts and declarations of the parties in the furtherance of the conspiracy; second, to the acts and declarations subsequent thereto, made by the defendants on trial, in regard to their part in said conspiracy, their flight, and the possession of the instrument of death, first by one, and then another of their number. To confirm the testimony of the accomplice in all points, and also to trace the possession and establish the identity of the Roarity pistol, the commonwealth proved, under the offers excepted to, and now assigned for error, that Kerrigan was met upon his return from Summit Hill on the night of the 15th of July by Churchill and McLaughlin; that on the 27th of July, Kerrigan exhibited the Roarity pistol to McParlan and McNellis, and sent it by the latter to Roarity the same day; that on the 1st of September, Kerrigan and the parties named were at McGehan's saloon; that the counter in the saloon was examined, and a piece cut therefrom, and offered in evidence, which showed the mark of the bullet, and the pistol offered in evidence, showing that the ball therefrom would have occasioned the indentation therein; that the pistol, with the Roarity pistol, was found on the 4th of September, in the place where Kerrigan stated they had been placed; that Roarity confessed to McParlan that he had lost his pistol by reason of its being found in the bushes at Tamaqua; that Robert Breslin had met McGehan and Boyle on a by-path from the road to Tamaqua. Surely, if corroboration is required of the statements of an accomplice, no rule has ever been established or

declared, that the corroboration may not extend to every part of his testimony, as to the acts and declarations of the defendants. And if a confession or statement is to be introduced in evidence, one very necessary element would seem to be, that parties who reside miles apart should be in such position as to render the making of that confession possible.

The ninth assignment of error relates to the admission of the evidence of Mrs. Breslin, who testified to the time her son, Robert Breslin, had returned home on the morning of the 6th of July. The witness Robert Breslin, had testified to his return home that morning, and to meeting near his home McGehan and Boyle on a by-path leading from the Tamaqua and Mauch Chunk road. The commonwealth simply fixed by the witness Mrs. Breslin, the fact of the return of Robert Breslin that morning to his home, and the time.

Mr. Ryon, in reply. We contend that Mrs. Breslin could not corroborate her son, who was called to corroborate Kerrigan, as to his whereabouts. If this were so, there might be an endless series of corroborations. The main error, in our estimation, arose under the second and third assignments. Until it had shown the conspiracy, the commonwealth had not the right to make the offer it did. Before testimony of the character given was allowed, good legal reasons therefor should have been shown. Its introduction was equivalent to the death warrant of these prisoners. The connection of the prisoners with the order of "Molly Maguires" had not been shown. Certain facts were testified to by Kerrigan, and the commonwealth proceeded to make the offer in regard to the order. The testimony of Kerrigan shows that the enterprise was an individual one, and not inspired or arranged in the order of "Molly Maguires," and after the commonwealth had failed to sustain their offer with his evidence, we asked the court to withdraw the evidence, which was refused. It was an attempt to show a general wicked practice, and without any connection with this particular case. It will be observed also that the conversation in regard to the trade of the death of Yost for that of Jones, was after the murder of Yost, and was not, therefore, the consideration for the murder of Yost. If there was any consideration it was between the parties as individuals, and not in pursuance of any arrangement of the order of "Molly Maguires," and we contend, therefore, that it was dangerous and incompetent testimony to prove the practices

of an infamous organization, and let it go to the jury, to show that these prisoners belonged to it.

Chief Justice AGNEW delivered the opinion of the court, May 7, 1877.

The county of Schuylkill constitutes a separate judicial district, having five judges, of whom three are learned in the law, and two are associates. One of the judges learned in the law and an associate were engaged in the trial of Thomas Manley, for homicide, from the 27th of June until July 12th, 1876. The case of these prisoners, James Carroll, James Boyle, Hugh McGehan and James Roarity, was called for trial July 6, 1876, before President Judge Pashing and Judge Walker, an associate learned in the law. In consequence of motions for a change of venue and to quash the array of jurors, the jury for this trial taken from the panel for the second week was not completed until Saturday, July 8th, the last day of the term.

The jury, being sworn, could not be discharged, and, consequently, the trial was laid over until the next week. Circumstances in relation to the business of the court existed, in consequence of which the actual hearing began on the 13th of July, and the trial lasted then until the 22d. It is objected that there was no power thus to continue the case from day to day, after the expiration of the term. The objection is groundless. At one time this argument might have had some force, but the strictness of the common law has been beneficially removed by legislation. The two acts of the 18th of March, 1875, Pamph. L., 25, 28, the act of 7th of April, 1876, Pamph. L., 19, and the decision in *Briceland v. The Commonwealth*, 24 P. F. Smith, 463, remove all doubt of the legality of the proceedings in the court below.

Under these laws it is competent, in such a district as that of Schuylkill, to hold two courts of oyer and terminer at the same time, to issue separate *venires*, and to make all necessary and convenient orders for the dispatch of business. The jurisdiction was, therefore, complete.

According to *Briceland v. The Commonwealth*, a trial begun on the last day of the term may be continued afterwards. A jury sworn cannot be discharged without prejudice to the interests of justice, and offenders must often escape if the mere modes and forms of procedure are to be held so strictly. The continu-

ance of the case, by adjournments, from day to day, from Monday until Thursday, when the trial proper began, was a matter necessarily within the sound discretion of the court. The court of oyer and terminer must know the state of its own business better than we, and what is proper in order to administer justice to all persons before the court. We cannot say that its discretion was abused. It does not appear to us that its authority was illegally exercised.

We come to the exceptions taken on the trial. On the morning of the 6th of July, 1875, about two o'clock, Benjamin F. Yost was shot by two men, while he was in the act of extinguishing a lamp, in the borough of Tamaqua, Schuylkill county. Hugh McGehan and James Boyle, the men shown to have shot him, resided at Summit Hill, about eight miles distant, and were strangers to him. No motive such as ordinarily influences men to commit so great a crime was shown to exist on their part. They were neither insane nor intoxicated, so that it might be inferred that the murder was without an ordinary motive, or done by persons unconscious of the wickedness of the act. Without a moving cause, the killing was so unreasonable and so contrary to human observation upon the commission of great crimes, the case would have been barren of those elements which lead the mind to a conviction of the guilt of persons who were not recognized at the time of the act, and against whom the evidence would have been altogether circumstantial. Under these circumstances a jury might reasonably doubt the identity of the prisoners McGehan and Boyle, and would find nothing satisfactory to rest upon for the conviction of James Carroll and James Roarity, the prisoners indicted jointly with them, but who were not present at the commission of the homicide. That the evidence as given convicts all of the murder is beyond a reasonable doubt, yet this certainty of the proof was to be solved by facts more strange, unnatural and horrible than ever disclosed hitherto in the annals of crime in this country—facts which nothing but the clearest evidence could compel us to believe. The leading features of this singular case is the existence of an order, or band of men, having its head in Ireland, extending into the United States and spread by ramifications throughout the coal regions of Pennsylvania, each minor division governed by a body-master of its own locality, to whom the secret passwords, signs and tokens of recognition, called "goods," are transmitted through a descend-

ing grade of officers from the head of the order to the body-masters, and by them distributed to the members. When we are informed that these men traded in blood, taking life for life by compact, burned houses, mills, breakers and valuable structures, at the instance of each other, and banded together, by means of concealment, money and perjury, to shield each other from punishment, our incredulity is so excited we would fail to believe the tale from the mere mouths of two or three witnesses; and nothing less than facts clearly and fully proved could command our belief. These the commonwealth undertook to prove, and strange as it may seem, proved beyond the possibility of a doubt. The chief witnesses by whom the organization called the "Ancient Order of Hibernians," but more commonly known as the "Molly Maguires," was shown to exist, and its purposes, practices, passwords and signs, were James Kerrigan, a member of the order, and a party to the killing of one John P. Jones, in return for the killing of Benjamin F. Yost, and James McParlan, a detective, who procured himself to be admitted a member of the order for the purpose of obtaining its secrets and frustrating its designs. Standing alone, the testimony of Kerrigan would be worthless, and even McParlan's, without confirmation, would be weak and perhaps unconvincing. Hence the commonwealth felt the necessity of sustaining the narratives of these witnesses by a long array of circumstances, beginning before the murder of Yost, and running down to the subsequent killing of Jones by way of return. These circumstances constituted a chain of evidence, branching out for the proof of two distinct, yet completely connected matters. One, primarily, for the identification of the prisoners McGehan and Boyle, by whom the murder of Yost was committed; the other, secondarily, for the proof of the causes and motives for the commission of the act, and the privity of Carroll and Roarity as accessories before the fact, and liable, therefore, as principals, under the 180th section of the criminal code of March 31, 1860, and 44th section of the criminal procedure act.

The chain of circumstances was, therefore, double, having a twofold relation to the case, which made the occurrences after the murder competent evidence. The facts which proved the existence, purposes and practices of the order known as the "Molly Maguires," as the means of exhibiting the causes and motives leading to the murder of Yost, and the participation of

Carroll and Roarity with McGehan and Boyle, in the execution of the deed, were not necessarily all antecedent. Some were, others were not, but by confessions and direct links were traceable to those having a prior existence. Hence the evidence of these subsequent events, while having no direct bearing on the identification of McGehan and Boyle as the actual perpetrators of the murder, had a strong and pertinent bearing upon the causes and motives operating upon them in the perpetration of the crime, and upon the connection of Carroll and Roarity with them, as participants in their guilt.

Thus the entire body of the evidence became necessary to show the conspiracy which linked all the prisoners together, to show that they were combined in the most intimate relations, and in a common purpose, that their subsequent conduct and confessions were thereby connected and made competent against each other, and that all these combinations and purposes led directly to the commission of another murder, that of Jones, as the return price of the killing of Yost, which became linked to each other, as a part of the evidence exhibiting the nature and effect of the combination leading to the killing of Yost. The whole network of the evidence is so complicated, and so clearly united and connected together in proving the guilt of all the prisoners, and their motives and the agencies employed, it is not possible to strike out the subsequent facts without destroying to a great extent the unity and relevancy of those which preceded the act. McParlan's testimony strongly corroborates Kerrigan's, and both are sustained and supported by other witnesses as to the facts, before, at the time of, and after the murder. When these two purposes of the testimony are borne in mind, we see clearly that the objections to the evidence constituting the second and third errors, and fourth to the ninth inclusive, are without weight. We must look at the real competency of the evidence and not at the order of its reception; and when we find that it was all finally competent, we will not reverse, because of the time or order of its introduction. In this connection we may notice that part of the offer set out in the second assignment of error, in which it is stated that the murder of Yost was to be the price or consideration of the murder of John P. Jones. Now, though when the murder of Yost was undertaken, that of John P. Jones was not then stated or understood to be the consideration for it,

yet it became an important fact in the disclosure of the purposes and practices of those who participated in the murder of Yost, and of the nature and customs of the order to which they belonged, which made the murder of Jones a return compensation for the murder of Yost. The evidence under that offer was therefore properly retained in the case, and the court committed no error in refusing to strike it out.

The relevancy of the evidence set out in the assignments of error down to the sixteenth, is made manifest by what has been said. The evidence is not simply corroborative of the testimony of Kerrigan; it is to a large extent confirmatory and independent, lending strength to those parts which in themselves tend to establish the guilt of the prisoners. This case is well illustrated by *Æsop's* fable of the bundle of rods. One by one each stick may be taken away and easily broken, but the united fagot resists the strength that would destroy it. The evidence being properly before the jury, we cannot perceive that the court committed error in charging upon it.

The sentence of the court of oyer and terminer is therefore affirmed, and the record is ordered to be remitted for execution of the sentence according to law.

STATE v. KRING.

(64 Mo., 591.)

HOMICIDE: Prisoner shackled in court—Evidence as to sanity—Error not prejudicial—Improper argument of prosecuting counsel—Moral insanity.

It is error, for which a conviction will be reversed, to keep the prisoner shackled in court during his trial.

The contents of letters written by the prisoner may be given in evidence to establish his sanity, where insanity is set up as a defense.

To constitute the crime of murder in the first degree, deliberation and premeditation must be proven, and an instruction to the jury, defining murder in the first degree, which omits these elements, is erroneous: *State v. Foster*, 61 Mo., 548; *State v. Lane*, 64 Mo., 319. But where all the evidence shows that the killing was deliberate and premeditated, insanity being the only defense set up, the error does not prejudice the prisoner, and is not ground for reversal.

The prosecuting counsel has no right to argue to the jury that in a doubtful case it is safer to convict than to acquit, on the ground that an acquittal is final, but if the defendant is wrongfully convicted the conviction will be

set aside in a higher court, and the trial judge should not permit such an argument.

It seems that moral as contradistinguished from mental, insanity, is insufficient to relieve a party from responsibility for crime.

NAPTON, J. The defendant was tried and convicted of murder in the first degree, at the November term, 1875, of the criminal court of St. Louis, and sentenced to be hanged, but on an appeal to the court of appeals of St. Louis, the judgment was reversed and a new trial ordered, and from this last judgment of reversal the state appeals to this court.

As the opinions of the court of appeals are reported and published, it is unnecessary to review the ground upon which their judgment of reversal is based, in which we concur. The English authorities, to sustain the conclusion of the court of appeals, are referred to in the opinion, and also in the brief of the counsel for the defendant, in this court, to which may be added a decision in California (*People v. Harrington*, 42 Cal., 165), referred to by the attorney-general. From all these cases it seems very clear that, without some good reason authorizing the criminal court to depart from the general practice in England and in this country, the shackles of the prisoner, when brought before the jury for trial, should be removed.

We have no doubt of the power of the criminal court, at the commencement, or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one; but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court, about three months before the term at which he was tried, would hardly authorize the court to assume that, on his trial for life, he would be guilty of similar outrages. There must be some reason, based on the conduct of the prisoner, at the time of the trial, to authorize so important a right to be forfeited.

When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being, in the opinion of the judge, a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties. We, therefore, concur in the opinion of the court of appeals on this point.

We have been unable to perceive, after a careful examination of the record touching that point, why the court refused to allow the contents of defendant's letters to Mrs. Broemser to be established by the witness called for that purpose, who proved their destruction, and who had read the letters. This occurred upon the examination of the second witness introduced by the defendant to establish his defense, which was exclusively confined to the proof of insanity. Although we have been unable to find any case which decides precisely the question involved in this case, it seems to be generally conceded, that when the question is concerning the sanity or insanity of a person, his acts and declarations previous to, and up to the period when his capacity for action or his responsibility for his acts is called in question, and even subsequently, are admissible to throw light on the condition of his intellect at the time such acts or declarations occur.

His letters are certainly as valuable proof as his verbal declarations. The case of *Wright v. Doe dem. Tatham* (7 Ad. and El., 317), contains a most elaborate discussion of this subject, both by the judges of the court of queen's bench and in the exchequer chamber. The question in that case was as to the capacity of a testator, and letters written to him, and found in his desk after his death, were offered as evidence of his sanity at the time he made his will, although written twenty or thirty years before his death.

A majority of the judges in both courts did not consider the letters admissible, because, upon examination of the testimony, they were of the opinion that sufficient evidence was not introduced to connect these letters with any act of the testator recognizing their reception. A minority of the judges in both courts, a separate opinion being delivered by each of the judges in both courts, thought the evidence sufficient of acts on the part of the testator, upon their reception, to authorize their introduction.

All the judges agreed that, without such connection being established between the letters and the action of the testator on their reception, the letters were inadmissible.

It will be observed that the letters in question were addressed to the person whose sanity was under consideration. In the present case the letters proposed to be introduced were written by the defendant, whose sanity was called in question, and it would seem, in such a case, that, in the opinion of the court who decided the case in *Wright v. Doe*, there was no question of

their competency, as declarations of his, to establish the condition of his mind at the time they were written. And, if the letters were destroyed, their contents could be established by a witness who had read them. Of course, such letters could be no evidence of the facts stated in them, and the court should so instruct the jury, as was done by the criminal court in the case in reference to other letters introduced which were found on the person of the prisoner when arrested.

The fifth instruction given by the court, on the trial, was as follows: "When killing is done, not accidentally or by mischance, but willfully, with intent to kill, even though such intent has existed for but a moment before the commission of the act, and with such malice as I have abounded in—that is the willful doing of a wrong act without just cause or excuse—it is murder in the first degree."

This instruction, as applied to murder in the first degree, was erroneous, according to the decisions of this court in the case of *The State v. Foster*, 61 Mo., 548, and *The State v. Lane*, 64 Mo., 319. The instruction, however, as applied to the facts of the present case, was immaterial and harmless, since all the evidence offered on behalf of the defendant, as well as that offered for the state, proved that the killing was premeditated and deliberate, if defendant was sane. There was no dispute on this point. The defense was based exclusively on the insanity of the prisoner, upon which subject the instructions given by the court are admitted to have been as favorable to the accused as the law justified.

A point has been made in regard to the propriety of certain remarks of the circuit attorney to the jury in his closing speech, which the bill of exceptions shows to have been as follows: "If you wrong the accused by finding him guilty, that wrong can be righted, because there are two courts above this in which the accused can have this reversed, the court of appeals and the supreme court. If you are not justified in finding this man guilty, it is in their power to rectify any error, while if, on the other hand, you turn the murderer loose in the community, no matter how frail might be the foundation on which you do it, and how frail may be the scaffolding, it takes him forever in the light of freedom again, and you will make a wound in this community that will never be healed."

The statement that the higher courts referred to had the

power to review the finding of the jury on the weight of evidence, was calculated to induce the jury to disregard their responsibility. It is unnecessary to decide whether such remarks from the counsel for the state would require the judge to grant a new trial, on their being brought to his attention in a motion for that purpose, since in this case a new trial has already been determined on. The judge presiding at the trial, in our opinion, should not have permitted such remarks to be made on the close of the argument, without a prompt correction. They were probably made through inadvertence and in the excitement of argument, and we merely notice them to observe their impropriety. The circuit attorney represents the state, and it is presumable that the state has no wish to convict or punish an innocent man. He is employed to see that the laws against criminals are enforced, but he is not required to avail himself of his privilege of concluding the argument before the jury, to state propositions of law which are clearly untenable, with a view to influence the jury in the verdict.

This was not a case involving property, but a proceeding involving life, and the remarks of the court in the case of *Lloyd v. Hannibal & St. Joseph Railroad Co.*, 53 Mo., 514, must be modified in their application to cases involving life or liberty.

As this case is remanded for a new trial, we decline to express any opinion on the weight of the testimony. That there was some evidence of insanity, seems conceded by the court which tried the case and instructed the jury on that subject. Whether the defendant was incapable of distinguishing between right and wrong, is a question for the jury who will hereafter try him. The instructions on this subject were as favorable to the prisoner as the law warranted, since what is called moral, as contradistinguished from mental insanity, is conceded to be insufficient to relieve a party from responsibility for crime.

The judgment of the court of appeals, ordering a new trial, is affirmed.

NOTE.—In *Ferguson v. State* (49 Ind., 33), and *State v. Smith* (75 N. C., 306), convictions were reversed on account of the use of improper language by the prosecuting counsel in his address to the jury, which the trial court on motion had refused to restrain. Both of these cases are reported in full in 1 Am. Crim. Rep., pp. 580 and 582.

RUNYAN v. STATE.

(57 Ind., 80.)

HOMICIDE: Self-defense — Necessity of retreating — Use of deadly weapons — Opinion on the facts.

The ancient doctrine which required an assailed person, under all circumstances, to retreat as far as he could with safety and avoid, if he possibly could, the necessity of taking human life in defense of his own life or in the protection of his person from great bodily harm, has been greatly modified by modern decisions. The weight of authority now is, that when a person, being without fault in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.

On the facts of this case it is considered by the court that there was no evidence tending to show that it was the duty of the accused to retreat before defending himself.

NIBLACK, J. At the February term, A. D. 1877, of the Henry circuit court, the appellant, John Runyan, was indicted and tried for the murder of one Charles Pressnal. He was convicted of manslaughter, and sentenced to the state prison for the term of eight years.

From the evidence, as it comes to us in the record, it appears that the appellant, who resided two or three miles from that place, went to Newcastle, in the county of Henry, in company with some other persons, on the 7th day of November, 1876, being the day of the last presidential election, for the purpose of casting his vote. During the day, one John Spell, a large and vigorous man, had an altercation with the appellant, during which the said Spell used harsh, opprobrious and threatening language. Afterwards, during the afternoon, the said Spell, on one or two other occasions, used other angry and threatening language to the appellant. Sometime in the afternoon, the appellant, whose right arm was so crippled that he had not full and free use of it, went to an acquaintance of his, who lived near by, and borrowed a pistol, saying that Spell was threatening him and following him up, and that he wanted to be able to defend himself in case he was attacked. After dark that evening, the appellant, with some of his friends, went across to the place of voting to get some election news, if they could, before leaving for home. The appellant stopped on the sidewalk, near the

voting place, and leaned himself against the wall of an adjacent building. While standing in that position he was approached by one Benjamin F. Moore, a constable of the township and an assistant marshal of the town, who commenced a quarrel with him, using angry, threatening and disparaging language toward him. While thus engaged with the appellant, Moore discovered one Henry Ray, a brother-in-law of the appellant, standing near by, a crowd having gathered around in the mean time, and turned on said Ray to push him away and out of the crowd. After Moore thus turned away, the deceased rushed upon the appellant and hit him two or three blows; the appellant thereupon drew a pistol from his coat pocket and shot the deceased, inflicting upon him a mortal wound, of which he soon afterwards, and on the same evening, died.

This is a brief outline of the circumstances connected with the killing of the deceased, as we have tried carefully to make it from a voluminous mass of testimony. A motion for a new trial was entered at the proper time and overruled.

On the trial, the court, of its own motion, gave to the jury a series of elaborate and carefully prepared instructions, in writing, consisting of eighteen in number, to the giving of each of which the defendant reserved an exception. The action of the court in giving these instructions was assigned as one of the causes for a new trial. The defendant, in his brief, urges objections to two only of these instructions, known as number seven and eight of the series, and only to so much of them as relates to the supposed duty of a person to retreat when assailed, before taking the life of his assailant.

In instruction number seven, the court commences by saying: "The law gives to every man the right of self-defense. This means that a man may defend his life, and may defend his person from great bodily harm. He may repel force by force, and he may resort to such force as, under the circumstances surrounding him, may reasonably seem necessary to repel the attack upon him, and, in his defense, he may even go to the extent of taking the life of his assailant. The law, however, is tender of human life, and will not suffer the life even of an assailant and wrong-doer to be taken, unless the assault is of such a character as to make it appear reasonably necessary to the assailed to take life in defense of his own life, or to protect his person from great bodily harm. And if the person assailed can protect his

life and his person by retreating, it is his duty to retreat, and thus avoid the necessity of taking human life. Do not understand me, gentlemen, to say, that retreat is always necessary before the party assailed may take life in his defense. Retreat might be perilous or impossible, and might tend only to increase the danger. If the assault is of such a character that it reasonably appears to the party assaulted that retreat can not be made so as to protect his life or his person from great bodily harm, then retreat is not required."

The court, further on, in the same instruction, after discussing the right of a person to defend himself in the use and enjoyment of the public highways, including the streets of towns and cities, and other contingencies in which the law permits human life to be taken in self-defense, adds: "And before a man can take life in self-defense, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assailant."

We do not copy the instruction entire, as it is of great length, and includes other legal propositions to which the defendant makes no objection. That portion of the instruction last above quoted, clearly does not state the law of self-defense correctly, as it is now recognized by the general drift of the American authorities. 1 Bishop on Criminal Law, 5th edition, section 865, says: "This right of self-defense is commonly stated in the American cases thus: If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable." Numerous cases are cited by him in support of that position. See, also, *Creek v. The State*, 24 Ind., 151; *Hicks v. The State*, 51 Ind., 407; *Wall v. The State*, 51 Ind., 453.

In the case of *Creek v. The State*, above cited, it was held that retreat is not always a condition which must precede the right of self defense. Wharton on Criminal Law, vol. 2, section 1019, says: "A man may repel force by force in the defense of his person, habitation or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if, in a conflict between them, he happen to kill, such killing is justifiable. The right of self-defense in cases of

this kind is founded on the law of nature, and is not, nor can be, superseded by any law of society. * * * The right extends to the protection of the person from great bodily harm."

A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense.

The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. Whatever may have been, or now is, the true rule in such a case, we think the instruction from which we have quoted, whether considered in its separate parts or taken altogether, laid too much stress on the duty of a party when assailed to retreat, before attempting to repel force by force, and thus prescribed too rigid a rule as applicable to the case at the bar.

As we construe the evidence before us, we are inclined to the opinion that the question of the defendant's duty to retreat when he was assailed was not fairly involved in this case, when it went to the jury.

The defendant was already standing practically against a wall, and surrounded by a crowd of persons, some of whom, at least, were unfriendly to him. While standing in that position, he was first approached by one person in an angry and threatening manner, and, when that person's back was turned, he was assaulted by another. It seems to us that the real question in the case, when it was given to the jury, was, was the defendant, under all the circumstances, justified in the use of a deadly weapon in repelling the assault of the deceased? We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that

question the law is simple and easy of solution, as has been already seen from the authorities cited above.

In our opinion, the court erred in giving the instruction numbered seven to the jury, and, for that reason, the judgment will have to be reversed.

We regard instruction number eight as obnoxious, to some extent, to the same objection urged against number seven, but we do not think it necessary to set it out, or further notice it here, in addition to what has already been decided. Other questions were reserved on the trial, and are presented to us by the record, but as they may not again arise in the cause, we deem it unnecessary to pass upon them now.

The judgment is reversed, and the case remitted for a new trial. The clerk will issue the necessary notice for the return of the defendant.

Petition for a rehearing overruled.

STATE V. ELLIOTT.

(45 Iowa, 486.)

HOMICIDE: *Challenge to juror—Dying declarations—Religious views of deceased—Evidence—Threats by deceased not communicated to prisoner.*

An erroneous overruling of a challenge for cause, is not reversible error unless the prisoner exhausted his peremptory challenges, and is thus prevented from getting rid of the obnoxious juror by a peremptory challenge.

Where dying declarations are offered in evidence, it is the province of the court to decide upon their competency; and where, before they are introduced, the respondent offers to prove that at the time the supposed dying declarations were made the deceased did not believe he was going to die, it is the duty of the court to hear this evidence and decide the question of fact before admitting the declarations.

Where dying declarations are admitted in evidence, the respondent has the right to show that the deceased did not believe in God, or in a future state. The declarations cannot be excluded on this ground, but this proof is material as affecting their credibility.

Circumstances tending to show hostility toward the defendant, on the part of the deceased, and threats made by the deceased against the defendant, but not communicated to him; *held*, properly excluded under the evidence in this case.

DAY, CH. J. I. Three persons, called as jurors, Slaughter, Chance and Wright, were, upon their examination as to their qualifications as jurors, challenged for cause by the defendant.

The challenge was overruled. The abstract shows that Slaughter and Chance were challenged peremptorily. The abstract does not show that Wright was so challenged, and it does not appear whether or not he served upon the jury, but the jury was accepted by the defendant without exhausting the peremptory challenges to which he was entitled. If, then, Wright was allowed to serve upon the jury, it was by the defendant's voluntary act. If the ruling of the court in overruling the challenges for cause was error, it was error without prejudice. If defendant had exhausted all his peremptory challenges, a very different question would be presented: *State v. Davis*, 41 Iowa, 311.

II. No person was present at the time the wound was inflicted upon Bold, of which he subsequently died. The principal evidence against the defendant consists in the dying declarations of deceased. The state introduced T. J. Caldwell, a surgeon, who was called to attend Bold. He testified as to his condition, and his belief that his dissolution was approaching. He was then asked to state what Bold said in regard to who shot him, or who inflicted the wound on him. The defendant objected, and then offered to prove to the court, by competent testimony, that at the time of making the declaration the deceased did not believe that he was about to die, but expected to recover from the wound, and the defendant asked the court to be permitted, at this stage of the proceeding, to introduce his evidence touching the matters made in his offer, for the purpose of testing the competency of the declarations of deceased. The court refused to admit this testimony, and permitted the declarations of deceased to be introduced. In this action we think the court erred. It is the province of the court to determine the competency of the declaration offered. In *Greenleaf on Evidence*, section 160, it is said: "The circumstances under which the declarations were made, are to be shown to the judge, it being his province, and not that of the jury, to determine whether they are admissible." The cases uniformly hold that the competency of such testimony is to be determined by the judge, in view of all the surrounding and attendant circumstances: *McDaniel v. The State*, 8 Sm. and M., 401; *Hill v. The Commonwealth*, 2 Gratt., 594; *Commonwealth v. Williams*, 2 Ashm., 69; *Rex v. Spilsbury*, 7 C. and P., 187; *Rex v. Bonner*, 6 C. and P., 386; *Rex v. Hucks*, 1 Stark. Rep., 521.

The court does not discharge this duty by simply hearing the

evidence produced upon the part of the state. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice: Roscoe's Criminal Evidence, p. 35. Before the judge decides the question of admissibility, he hears all the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover: Phillips on Evidence, Cowen and Hill's Notes, part 1, page 252. In the same volume it is said, page 253, "We see that competency is a question of fact for the court, as in other cases. They are to find upon it as the jury do upon the main case, taking into view all the circumstances calculated to prove and disprove that despair of life which shall be equivalent to a sworn obligation." And upon page 254, it is said: "Upon this question of fact no rule can be adopted which will reach every variety of detail. The court try the competency of the deceased as the jury do his credibility, and the decision in either case on a conflict of testimony, must be final." We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered by the defendant, before determining that the declarations were competent, and permitting them to go to the jury.

III. The defendant offered to prove, as affecting the admissibility of the declarations of deceased, that he was a materialist, and that he believed in no God or future conscious existence. The proposed proof was not competent for the purpose of affecting the admissibility of the dying declarations. If Bold had been alive, he would have been a competent witness, although a disbeliever in God and a future state. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in this state: Code, § 3636.

IV. The defendant, however, when he came to make out his defense, offered to prove the foregoing facts, as affecting the credibility of the declarations of deceased, and the evidence was not admitted for this purpose. In this there was error. Under

the common law, persons insensible to the obligation of an oath, from defect of religious sentiment and belief, were incompetent to testify as witnesses. The very nature of an oath presupposes that the witness believes in the existence of an Omniscient Supreme Being, the rewarder of truth, and avenger of falsehood. Atheists, therefore, and all infidels, that is, all those who profess no religion that can bind their consciences to speak truth, are, at common law, rejected as incompetent to testify: 1 Greenleaf, section 368. Our Code, section 3637, provides: "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." If Bold had been offered as a witness, it is very clear that the proposed proof would have been competent for the purpose of affecting his credibility.

But dying declarations are open to direct contradiction in the same manner as any other part of the case for the prosecution, and the prisoner is at liberty to prove that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution, and that no reliance is to be placed on his dying declarations: Roscoe's Criminal Evidence, page 35.

V. Against the objection of defendant, the court permitted the affidavit made by John N. Bold, before Lemuel Warford, a justice of the peace, to be offered in evidence. The evidence shows that Bold gave Warford the substance of the affidavit, and Warford shaped it. About two-thirds of it is in the language of Bold, and the balance is in the language of Warford. It was not read over to Bold after he signed it. As the statement was neither in the language of deceased, nor read over to him before he signed it, we think it was inadmissible.

VI. The court rejected proof by defendant tending to show that Bold had poisoned defendant's flour, attempting thereby to poison defendant and his family. We think there was no error in rejecting this testimony.

VII. The court refused to permit defendant to prove acts and conduct of defendant showing that he was very much afraid of Bold, and sought to get away from and avoid him. There was no error in this ruling.

VIII. Evidence of threats made by deceased against the defendant, but not communicated to defendant, was rejected. There was proof of threats, however, which were communicated,

which brings the case fully within the principle of *State v. Woodson*, 41 Iowa, 424, and renders the ruling, if erroneous, error without prejudice. But as the question will probably arise upon the re-trial, we deem it proper to determine it now. The decided weight of authority holds that threats uncommunicated are inadmissible. See *Com. v. Frengan*, 44 Penn., 586; *Newcomb v. State*, 37 Miss., 383; *Powell v. State*, 19 Ala., 577; *Coker v. State*, 20 Ark., 53; *Atkins v. State*, 16 Ark., 568; *Gingo v. State*, 29 Geo., 470; *State v. Dumphrey*, 4 Minn., 438; *State v. Gregor*, 21 La. Ann., 473; *State v. Jackson*, 17 Miss., 544. The only exception to the rule seems to be that, where evidence had been given making it a question whether the defendant had perpetrated the act in defense of his person against an attempt to murder him, or inflict some great bodily harm upon him, violent threats made by deceased against the defendant a short time before the occurrence, may be proved, though not communicated: *Stokes v. The People*, 53 N. Y., 164. The threats offered to be proved in this case, do not fall within this principle. We think they were properly rejected.

IX. The defendant asked fifty-three instructions, all of which were refused. The court gave thirty-five instructions. Many objections are urged to the instructions given, and to the refusal to give those asked. It would extend this opinion to an undesirable length were we to take up and consider *seriatim* all these objections. The charge of the court is very full, clear and explicit, and, taken together, very fairly presents the law of the case. If any portion of it fails to sufficiently qualify or extend the doctrines presented, it is likely that the learned judge who tried the case will himself make the proper corrections upon the retrial.

For the errors discussed, the judgment is reversed.

STATE v. HARDIE.

(47 Iowa, 647.)

HOMICIDE: *Manslaughter—Criminal carelessness in use of a revolver—Instructions to jury.*

It appeared that the defendant, intending merely to frighten the deceased, discharged a revolver at her and inflicted a mortal wound. The revolver had one load in it, but the defendant had reason to believe, and did believe, that it would not go off. *Held*, that on such facts no jury

would be warranted in finding that a man of ordinary prudence could so conduct himself, and that a request to charge, based on that assumption, was properly refused.

The court charged the jury as follows: "And in this case I submit to you to find the facts of recklessness and carelessness under the evidence; and if you find that the death of the party was occasioned through the recklessness and carelessness of the defendant, then you should convict him (*i. e.*, of manslaughter), and, if not, you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like circumstances, and if he did not use such care he should be convicted, otherwise he should be acquitted." *Held*, that this instruction was quite as favorable as the defendant was entitled to.

ROTHROCK, CH. J. I. It appears, from the evidence, that the defendant was a boarder in the family of one Gantz, who is his brother-in-law. On the day of the homicide defendant was engaged in varnishing furniture. Mrs. Sutfen, a neighbor, called at the house, and, after some friendly conversation, she went into the kitchen. When she came back defendant picked up a tack hammer and struck on the door. She said, "My God, I thought it was a revolver." A short time afterwards she went into the yard to get a kitten. Defendant said he would frighten her with the revolver as she came in. He took a revolver from a stand-drawer and went out of the room, and was in the kitchen when the revolver was discharged. He immediately came in and said to Mrs. Gantz, his sister, "My God, Hannah, come and see what I have done." His sister went out and found Mrs. Sutfen lying on the sidewalk at the side of the house, with a gun-shot wound in the head, and in a dying condition. A physician was immediately called and made an examination of the deceased, took the revolver from the defendant, and informed him that nothing could be done for the deceased, whereupon the defendant became violent, said the shot was accidental, and exclaimed several times that he would kill himself. It became necessary to secure him, which was done by tying him with ropes.

The revolver had been in the house for about five years. It was found by Gantz in the road. There was one load in it when found. Some six months after it was found, Gantz tried to shoot the load from it and it would not go off. He tried to punch the load out, but could not move it. He then laid it away, thinking it was harmless.

The defendant was about the house and knew the condition of the revolver. Upon one occasion Gantz said he would try to kill a cat with the revolver. The defendant being present, said he would not be afraid to allow it to be snapped at him all day. The revolver remained in the same condition that it was when found, no other load having been put into it, and it was considered by the family, as well as defendant, as entirely harmless.

The foregoing is the substance of all the evidence.

The state did not claim that the defendant was guilty of murder, but that he was guilty of manslaughter, because of criminal carelessness. The defendant insisted that there was no such carelessness as to render the act criminal, and that it was homicide by misadventure, and therefore excusable.

The court instructed the jury as follows: "5. And on the charge of manslaughter, I instruct you that if the defendant used a dangerous and deadly weapon, in a careless and reckless manner, by reason of which instrument so used he killed the deceased, then he is guilty of manslaughter, although no harm was in fact intended." Other instructions of like import were given, and the question of criminal carelessness was submitted to the jury as follows: "8. And in this case I submit to you to find the facts of recklessness and carelessness under the evidence, and if you find that the death of the party was occasioned through recklessness and carelessness of the defendant, then you should convict him, and, if not, you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like circumstances; and if he did not use such care he should be convicted; otherwise he should be acquitted."

There can be no doubt that the instructions given by the court embody the correct rule as to criminal carelessness in the use of a deadly weapon. Counsel for defendant insist that the instructions of the court do not go far enough, and, upon the trial, asked that the court give to the jury the following instruction:

"3. Although the deceased came to her death from the discharge of a pistol in the hands of the defendant, yet, if the defendant had good reason to believe, and did believe, that the pistol which caused her death was not in any manner dangerous, but was entirely harmless, and if he did nothing more than a

man of ordinary prudence and caution might have done under like circumstances, then the jury should find him not criminally liable, and should acquit."

This instruction, and others of like import, were refused by the court, and we think the ruling was correct.

That the revolver was, in fact, a deadly weapon, is conclusively shown by the terrible tragedy consequent upon defendant's act in firing it off. If it had been, in fact, unloaded, no homicide would have resulted, but the defendant would have been justly censurable for a most reckless and imprudent act, in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her.

No jury would be warranted in finding that men of ordinary prudence so conduct themselves. On the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of fire-arms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that, being loaded, it will do no injury. When persons engage in such reckless sport they should be held liable for the consequences of their acts.

II. It is argued that the evidence does not show the defendant guilty of criminal carelessness, because it does not appear that the defendant pointed the pistol at the deceased, or how it happened to be discharged. The fact that defendant took the weapon from the drawer with the avowed purpose of frightening the deceased, and while in his hands it was discharged, with fatal effect, together with his admission that he did the act, fully warranted the jury in finding that he purposely pointed the pistol and discharged it at the deceased.

Affirmed.

COX v. PEOPLE.

(82 Ill., 191.)

INCEST: *Attempt by solicitation — Statute construed.*

In Illinois a bare solicitation to commit incest is not indictable. Such a solicitation is not an attempt within the meaning of the statute.

It seems that, under the statute, "whoever attempts to commit any offense prohibited by law, and does any act towards it, but fails," etc., "a bare solicitation is not an attempt, except it be such a solicitation whose

immediate tendency is to provoke a breach of the peace, as a challenge to fight, or to the obstruction of or interference with public justice, as where perjury is advised," etc.

PER CURIAM. The indictment contains two counts. In the first, the defendant is charged with incest; and, in the second, he is charged with an assault with intent to commit incest.

The verdict of the jury is: "We, the jury, find the defendant guilty of an attempt to commit incest with Caroline Rider, under the first count of the indictment, and assess his punishment at imprisonment in the penitentiary for the term of two years."

The crime of incest is punishable, if it be by a father cohabiting with his daughter, by confinement in the penitentiary for any term not exceeding twenty years; and, if it be by cohabiting between other persons, within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, by confinement in the penitentiary for a term not exceeding ten years: R. L. 1874, p. 376, secs. 156, 157.

And, by another section of the Criminal Code: "Whoever attempts to commit any offense prohibited by law, and does any act towards it, but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, where the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one nor more than five years, in all other cases, by fine not exceeding \$300, or by confinement in the county jail not exceeding six months:" R. L. 1874, p. 393, sec. 273.

It is not claimed, nor is there any express provision made by the Criminal Code for the punishment of an attempt to commit incest, so that the defendant's case is brought within this section if he is liable at all. The evidence shows, simply, an unsuccessful solicitation to commit the offense, and the question, therefore, is, does a bare solicitation constitute an attempt, within the meaning of the section?

Wharton, in discussing whether solicitations to commit are independently indictable, in the second volume of his work on Criminal Law (7th ed.), in section 2691, says: "They certainly are, * * * where their object is to provoke a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable where their object is interference with public justice, as where resistance to the execution

of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. * * * But if the offense be not consummated, and if it be not of such a character that its solicitation tends to a breach of the peace, or the corruption of the body politic, the question whether the solicitation is by itself the subject of penal prosecution, must be answered in the negative." See, also, *Smith v. Com.*, 54 Penn. St., 209; *Com. v. Willard*, 22 Pickering, 476.

We are of opinion that this is the better view of the law, although there are respectable authorities holding a different rule; and, reading the section quoted in the light of it, the words, "Whoever attempts to commit any offense prohibited by law, and does any act towards it," must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step taken towards the commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense.

We are, therefore, of opinion there was error, both in giving instructions at the instance of the people, and in refusing those asked by the defendant, for which the judgment should be reversed and the cause remanded.

Judgment reversed.

STATE v. KEESLER.

(78 N. C., 489.)

INCEST.

Incest is not an indictable offense at common law, and where there is no statute against it, it is not a criminal offense.

BYRUM, J. The defendant is indicted for incest. This offense was not indictable at common law, and as we have no statute in this state declaring it to be a criminal offense, this indictment cannot be maintained. It is related that in the time of the Commonwealth in England, when the ruling powers found it for their interest to put on the semblance of extraordinary strictness and purity of morals, incest and willful adultery were made capital crimes; but at the Restoration, when men from the abhorrence

of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew the law of such unfashionable rigor; and these offenses have been ever since left to the feeble coercion of the spiritual court according to the canon law: 4 Bl., 64; 2 Tomlin. L. D., 160; Bish. Stat. Cr., sections 725, 728; Bish. Mar. & Div., sections 313, 315. In most of the states of the Union incest is made an indictable offense by statute. Perhaps its rare occurrence in this state has caused the revolting crime to pass unnoticed by the legislature.

No error.

PER CURIAM.

Judgment affirmed.

TERRITORY V. PAUL.

(2 Mont. Ter., 314.)

LARCENY: *Reputation — Impeaching witness — Defective charge — Wife of co-respondent as witness.*

Where it appears affirmatively by the testimony of an impeaching witness, that he has some knowledge of the reputation of a witness, whose reputation for veracity he is called to discredit, it is error for the court to reject his testimony as to that reputation on the ground that his knowledge of that reputation is not sufficient. It is for the jury to judge of the weight of the testimony.

An impeaching witness may be cross-examined by the adverse party as to the extent and sources of his knowledge, before testifying to the reputation of the witness he is called to impeach.

If the court in a distinct proposition states to the jury on what facts they may find the defendant guilty, and in that proposition entirely omits to direct the attention of the jury to the necessity of finding a felonious intent, it is error, although the court has in another part of the charge stated the law of larceny fully and correctly.

The wife of a respondent is not a competent witness for a co-respondent, who is being tried at the same time.

KNOWLES, J. The principal assignment of error in this case is the rejection, by the court, of the testimony of Worthington, who was called by the defendants for the purpose of impeaching the witness for the territory, McDougal. Counsel for the defense introduced the witness Worthington, and asked him the following questions:

"1. Are you acquainted with the general reputation of the witness McDougal, in the neighborhood where he lives, for truth and veracity?" Answer, "I am."

"2. Is that reputation good or bad?"

This question was objected to by the prosecution, and the objection sustained.

"3. From what you know of his general reputation for truth and veracity, in the neighborhood in which he lives, would you believe him under oath?"

This question was objected to by the prosecution, and the court sustained the objection, and the defendants excepted. When the first question was answered, the prosecution claimed the privilege of cross-examining Worthington, for the purpose of showing that he did not have knowledge sufficient of the general character of McDougal, in the neighborhood where he lived, to entitle him to testify as to his general character for truth and veracity. This was granted, and upon this cross-examination the witness said: "That there were about seventy-five people residing in the vicinity of McDougal who would be competent to testify in any case; that he had never known but thirteen out of that number even speak of the character of the witness for truth and veracity; that a Mr. Belcher was one of them, and that he said in his own house, in July, 1872, that McDougal was a bad man, a drunkard and a thief." "This was when I had McDougal arrested for robbery. The court then permitted the prosecution to introduce said Belcher, as a witness to the above conversation with the impeaching witness. This was objected to by the defense. Belcher said: "That he had no recollection of ever having any conversation with the witness Worthington relative to the character of McDougal for truth, and would have remembered it if he ever had." The court held that Worthington had not shown sufficient knowledge of the reputation of McDougal for truth and veracity to entitle him to testify concerning the same.

The general rule in the text-books that treat upon the impeachment of a witness whose reputation for truth and veracity is in question, is this: The witness must be asked: "Do you know the general reputation of the witness for truth and veracity in the neighborhood where he lives?" If the answer be in the affirmative to this question, and not otherwise, then the further question may be asked: "What is that reputation?" The English text-books say it is proper to ask the witness, if he says this reputation is bad: "From what you know of this reputation, would you believe the witness under oath?"

Some American authorities sustain the same rule. Although the question does not seem to have been considered much, whether the party whose witness is sought to be impeached should have the right to cross-examine the impeaching witness, as to his knowledge of the general reputation of the witness whose character for truth and veracity is questioned, it would seem that the right to cross-examine an impeaching witness should be as completely recognized as the right to cross-examine any other witness. This has been the general practice of the courts in this territory. Whether, if it should appear from the cross-examination of the impeaching witness that he has no knowledge of the general reputation, for truth and veracity, of a witness that is sought to be impeached, the court should have the power to exclude his evidence, is a question upon which I have seen no authority. Is the fact as to whether a witness has sufficient knowledge of the general reputation of another witness for truth and veracity, for the court or jury? If a witness answers that he has no knowledge of the general reputation of another witness for truth and veracity, it would be wrong to allow him to testify to what that reputation was, and the court has the power to stop the examination of such a witness. If a witness should show, in cross-examination, that he had no knowledge of the general reputation of a witness sought to be impeached, for truth and veracity, it would seem that the court ought to have the power to say that a man could not be impeached by any such witness. When a witness shows he has some knowledge of a man's character, for truth and veracity, in the neighborhood where he lives, I think the rule should be, that the jury must judge as to the weight to be given to his testimony. To hold, in all cases, the court should determine, from the testimony of a witness, whether he had sufficient knowledge of a man's general character, for truth and veracity, would make it the arbiter of a question of fact. It was contended that an impeaching witness occupied the position of an expert, as to character for truth and veracity.

There are some analogies between the two classes of witnesses. When an expert is introduced, no one would contend that it was the province of the court to determine whether he had sufficient knowledge of the subject upon which he was called to testify, to permit his evidence to go to the jury. If a physician should be called upon to testify to a medical point, it would not be the

province of the court to determine whether he had sufficient knowledge of his profession to permit him to testify in regard thereto. The witness may be cross-examined as to his medical knowledge, and the jury must judge of his capacity to testify to such a point.

We find the witness Worthington did say, "that he was acquainted with the general reputation of the witness McDougal, for truth and veracity, in the neighborhood where he lived, and that he had heard some thirteen persons, neighbors of the said McDougal, speak of his reputation for truth and veracity; that there were some seventy-five persons competent to testify in any case, who lived in the neighborhood of McDougal." The court, having no power to determine whether a man has sufficient knowledge of a witness's general reputation for truth and veracity where he has some, erred in excluding the testimony of Worthington. The court had no right to say whether a man can receive sufficient information from thirteen men in a witness's neighborhood as to his general reputation for truth and veracity. If thirteen men would not be sufficient to impart such information, how many would? The testimony of Worthington to his conversation with Belcher does not seem to have been upon McDougal's reputation for truth and veracity. The introduction of Belcher to contradict Worthington upon this point seems to have had for its object the giving to the court information to enable it to decide whether Worthington did have sufficient information as to the general reputation for truth and veracity of McDougal, to permit him to testify in relation thereto. This introduction of Belcher shows the position assumed by the court in relation to this matter, that it, and not the jury, should determine whether Worthington had sufficient knowledge of the general reputation of McDougal for truth and veracity in the neighborhood where he lived to allow him to testify in regard thereto. This was error.

The second exception is to the following part of the judge's charge to the jury: "I further say to you, gentlemen, as a further matter of law for your application to the proof, that if you should find from the proof that, although the defendant William Barnes did not, with the defendant Paul, kill the ox in question, but that he did join with A. W. McDougal in so doing, knowing the same was not the property of McDougal, and shall further find that Addison Myers was the owner thereof, then you should

find the defendant Barnes guilty, although he may not have then known who was the real owner of the ox in question." There can be no doubt that, taken by itself, this part of the charge is wrong. It leaves out of view the *animus furandi*. To constitute larceny, the party committing the offense must have the view of converting the property to his own use permanently, or depriving the owner of his property permanently. The facts specified in the above charge require, in addition thereto, the felonious intent. Either Barnes or McDougal, of which Barnes had knowledge, must have intended to make this ox their property, or deprive the owner of the same permanently. It is true, that in other parts of the charge, the court sufficiently defines the crime of larceny, and specifies the necessary ingredients thereof. But nowhere does the court call the attention of the jury to the specific facts set forth in the above charge, and make the necessary additions to constitute the crime of larceny.

The rest of the charge, save as to the verdict the jury might bring in, refers to the facts that appear against Paul and Barnes jointly. There was some evidence against Barnes that does not bear with equal force against Paul. While admitting that a charge to a jury should be taken together, and, if it states the law correctly, there is no error, I hold that as to the facts specified in this part of the charge, the charge taken together, does not state the law, and hence, that there was an error stated by the court.

The last point I shall answer is the refusal of the court to admit the testimony of the wife of Paul on behalf of Barnes. A wife, where her husband and another are jointly indicted, cannot testify on behalf of the other party, if her testimony would have a tendency to influence the case against her husband. The statute has not changed this rule. It appears that Paul and Barnes were tried together, and that the testimony of Mrs. Paul would contradict an important point in the evidence of McDougal, and tend to discredit the testimony he had given against her husband Paul, as well as that against Barnes. I find no error in the exclusion of this evidence on the part of the court. The judgment is reversed.

Judgment reversed.

NOTE.—For authorities which hold that the wife of a respondent is not a competent witness for the co-respondent, even though they have separate trials, see *U. S. v. Wade*, 2 Cranch C. Ct., 680; *Collier v. State*, 20 Ark., 36;

Pullen v. People, 1 Dougl. (Mich.), 48; but the Michigan statute of 1861 changes the rule, so that now the wife of a co-defendant is a competent witness: *Morrissey v. People*, 11 Mich., 327. The following authorities hold that the wife of one jointly indicted is a competent witness for those indicted with her husband, if they are tried separately: *Thompson v. Com.*, 1 Metc. (Ky.), 13; *Cornelius v. Com.*, 3 Id., 481; *State v. Burnside*, 37 Mo., 343; *Com. v. Manson*, 2 Ashm. (Pa.), 31; *Workman v. State*, 4 Sneed (Tenn.), 425.

BAKER v. STATE.

(29 Ohio St., 184.)

LARCENY OF LOST GOODS.

In a case where the defendant is charged with the larceny of lost goods, the defendant should be convicted, if it appears that, when he found them, he intended to appropriate them to his own use, having reasonable grounds for believing, at the time of the finding, that the owner could be found.

In this case the defendant asked for an acquittal on the whole evidence. This was refused by the trial court, and the refusal was assigned for error.

McILVAINE, J. The testimony offered on the trial below shows that on the evening of April 28, 1872, the defendant below found, on a county public road, at Van Wert county, a pocket-book containing one ten-dollar bill, at a point in the road near which he had been engaged at work during the day, and that the goods found had been lost by the owner, Hinton Alden, at that point a few hours before. That Alden, at the time he lost the pocket-book, had been detained at that point for a short time, and within plain sight of the defendant. On the next morning Alden, who lived in the immediate neighborhood, informed the defendant of his loss, but defendant concealed the fact of finding, and afterward expended the money in the purchase of clothing. A few days after, the defendant admitted to a witness in the case, that he had found the pocket-book, and that he knew the owner, and on inquiry why he had not returned the goods to the owner, replied, "Finders are keepers." It was also shown by an admission of defendant, that the appearance of the pocket-book at the time he found it, indicated that it had been very recently lost. The law of this case is well stated by Baron

Parke, in *Regina v. Thurborn*, 1 Dennison C. C., 387; also, reported under the name of *Regina v. Wood*, 3 Cox C. C., 453, thus: "If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he takes, with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

The fact, in this case, that the defendant expended the money after he had certain knowledge of the owner, did not render him guilty of larceny, if the offense was not complete before. The loss and finding of the goods were not disputed in the court below, but the following questions were made:

1. When the defendant first took the goods upon the finding, did he intend to appropriate them to his own use? This question was fairly found against him, from the fact of concealing the finding when informed by the owner of his loss, and from his subsequent declaration that, "Finders are owners."

2. Did he have reasonable grounds to believe, at the time of finding the goods, that the owner could be found? It was sufficiently proved that the defendant knew that the goods had been recently lost before the finding, and that Alden had recently been at the point where he found them. These facts constitute reasonable ground for believing that Alden was the owner.

Judgment affirmed.

NOTE.—On reviewing the authorities, it will be found that in this case the Supreme Court of Ohio have gone beyond the doctrine laid down in the American cases on this subject. See *Com. v. Titus*, 1 Am. Cr. Rep., 416, and note, p. 418, where the American cases on this subject are collected.

STATE v. LYMUS.

(26 Ohio St., 400.)

LARCENY: *Dog.*

In Ohio, as at the common law, a dog is not the subject of larceny.

REX, J. The defendant was indicted at the March term, 1872, of the court of common pleas of Logan county, for burglary.

The burglary consisted of breaking and entering a stable in

the night season with intent to steal property of value contained therein, to wit, a dog found therein, the property of the owner of the stable, of the value of twenty-five dollars. The defendant moved to quash the indictment, on the ground that it did not charge him with the commission of an offense which was punishable by the criminal laws of this state.

The court sustained the motion and ordered the defendant to be discharged, holding "that there is no law authorizing the indictment, and that it does not charge a crime, offense, or misdemeanor."

The prosecuting attorney excepted to the ruling and decision of the court, and presented a bill of exceptions, embodying the indictment, motion, ruling and decision of the court, and the exceptions taken thereto, which was signed and sealed by the court, and made part of the record in the case.

The only question presented by the exception is: Is the stealing of a dog a crime in this state?

The property intended to be stolen by the burglar must be property of which a larceny may be committed. We have no statute that, in express terms, declares a dog to be the subject of larceny; but it is claimed that inasmuch as the right of property in dogs is protected by civil remedies, and as a recent statute of this state requires them to be listed for taxation, they are property, and, therefore, properly the subjects of larceny. We do not think so. Neither the fact that the right of property in dogs is protected in this state by civil remedies, nor the fact that recent legislation requires them to be listed for taxation, has the effect of enlarging the operations of the statutes defining and punishing larceny.

At the common law, although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action: 2 Chit. Black, 393, 394; 1 Bish. Cr. Law, 1080. In describing the property of which a larceny, either grand or petit, may be committed, the statutes of this state use the words "goods and chattels." These words at the common law have a settled and well-defined meaning, and when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at the common law to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are

not included in the words "goods and chattels," as used in the statutes referred to.

Bonds, bills, notes, etc., are goods and chattels, and yet, as they were held not to be the subjects of larceny at common law, it was deemed necessary to so enlarge the larceny statutes as to declare the stealing or malicious destruction of them punishable in the same manner, and to the same extent, as the larceny of money, or other goods and chattels of the same value. So with dogs. It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the state has so declared. "Constructive crimes are odious and dangerous:" *Findlay v. Bean*, 8 Serg. and Rawle, 571.

We are, therefore, of opinion, that the court of common pleas did not err in the ruling and decision excepted to.

Exceptions overruled.

WHITE, and McILVAINE, JJ., concurred.

WELCH, C. J., and GILMORE, J., dissented.

NOTE.—It was held, in *People v. Campbell*, 4 Park (N. Y.) Cr., 386, that a dog is the subject of larceny in New York.

BARTON V. STATE.

(29 Ark., 68.)

LARCENY: *Indictment — Description of money.*

An indictment for the larceny of money, which simply charges the stealing of "one hundred and thirty dollars," without any specific description of the kind of money, is bad on motion in arrest of judgment.

ENGLISH, C. J. The appellant was indicted in the criminal court of Pulaski county, as follows:

"The grand jury of Pulaski county, in the name and by the authority of the state of Arkansas, accuse John Barton of the crime of larceny, committed as follows, viz.: The said John Barton, on the ninth day of July, A. D. 1872, in the county and state aforesaid, one hundred and thirty dollars, the property of Joseph Schaer, from the person of the said Joseph Schaer, then and there feloniously did take, steal and carry away, against the peace and dignity of the state of Arkansas."

The appellant entered a demurrer to the indictment—in short, upon the record—which he subsequently withdrew, and pleaded

not guilty. He was tried by a jury, found guilty, and moved in arrest of judgment, on the ground that the facts stated in the indictment did not constitute a public offense. The motion was overruled, and he was sentenced to the penitentiary.

The objection to the indictment is, that it does not specifically describe the money alleged to have been stolen.

The appellant is charged with stealing "one hundred and thirty dollars," etc. Whether the subject of the larceny was coin, United States treasury notes, or bank-notes, is not alleged.

If the term "dollars" may be said to have a legal meaning, and to import the national coin (*Rowe v. Green et al.*, 24 Ark., 210), we are left to conjecture what kind of coin the appellant was charged with stealing. It is a loose attempt at a code indictment.

The code provides that "The only ground upon which a judgment shall be arrested is, that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court; and the court may arrest the judgment without motion, on observing such defect:" *Gantt's Dig.*, sec. 1975.

What is the meaning of this section of the code? To charge a man with shooting at the moon would not be charging him with a public offense. To charge him with stealing in Texas would not be charging an offense within the jurisdiction of an Arkansas court. To charge a man with larceny merely, would be charging him with a public offense by a technical name only. Is it in such instances, or similar instances only, that the judgment may be arrested? We think not. Such could not have been the intention of the framers of the code. It requires certain material facts to make any public offense of whatever name, and these facts, well ascertained in law, and easily apprehended by ordinary intelligence, should be alleged in the indictment, whether framed under the code or under the common law.

Our code provisions in relation to indictments, arrest of judgment, etc., were taken from the Kentucky code. *Rhoads et al. v. Commonwealth*, 2 Duvall (Ky.), 159, was an indictment for the larceny of treasury notes, etc., and there was, as in this case, a motion in arrest of judgment on a verdict of guilty.

The court said: "On the subject of indictments, our criminal code recognized and established the modern common law, rightly understood and rationally applied. It dispenses with form, and requires substance only. And what is now substance at common

law is substance under the code—and that is every fact necessary to constitute the specific crime charged—alleged with only such precision as: 1st. To enable the court to see that, admitting the fact, it has jurisdiction, and that the imputed crime has been committed by the accused. 2d. To enable the accused to understand the precise charge, and, without surprise, to prepare for defense against the proof which may be admissible to sustain that specific charge; and, 3d. To make the verdict and judgment certainly available as a bar to any subsequent prosecution for the same criminal act.”

In the case quoted from the appellants were charged with stealing “one lot of treasury notes, called greenbacks, the issue of the treasury of the United States of America, and one lot of Kentucky bank-notes, and fifteen dollars in gold coin.” This charge was more specific than the charge in the indictment now before us.

The court, after making the general remarks on the subject of indictments above quoted, said: “According to this test, the indictment in this case seems to us insufficient to authorize conviction.

“One lot of treasury notes, without any specification of denomination, number or value, is too indefinite for the identification of the thing taken, or of any part of it; and one lot of Kentucky bank-notes, without even a specification of the bank, is still more indefinite.

“Neither of these charges sufficiently notified the accused of the facts to be proved; and a conviction on either of them might not be availably pleaded in bar of another indictment for the same offense. A minute description of all the treasury and bank-notes might be impossible, and, therefore, is not required. But a nearer approach to it than this indictment makes may be presumed to have been easy, and ought to be required. A specification of even one of the notes in each lot, so as to identify it, might be sufficient to answer the ends of the test just defined.

“Nor can fifteen dollars in gold coin, without any specification of the number of pieces, or of the character or identity of the coin, or of any portion of it, be deemed sufficient for all the purposes of the law.”

In *The State v. Longbottom*, 11 Humph., 39, the accused was charged with stealing “ten dollars good and lawful money of

the state of Tennessee," and, on conviction, the judgment was arrested and the state appealed.

The Supreme Court, of Tennessee, said: "Where personal chattels are the subject of an offense, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated: 2 Hale, 182-3; Arch. Cr. Pl., 49. Money should be specified as so many pieces of the current gold or silver coin of the realm. And the species of coin must be stated by its appropriate name: Arch., 50." The court held that the subject of the larceny was insufficiently described, and that the judgment was properly arrested.

In *The People v. Ball*, 14 Cal., 101, the subject of the larceny was described as "three thousand dollars lawful money of the United States." The court said: "This description is not sufficient. In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts. The species of coin must be specified: Arch. Cr. Pl., 61; Whart. Cr. Law, 132."

In *The State v. Murphy*, 6 Ala., 846, the subject of the larceny was thus described: "Sundry pieces of silver coin, made current by law, usage and custom within the state of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents, of the value," etc., and this was held to be insufficient.

In *McKune v. The State*, 11 Ind., 195, the accused was charged with stealing "sixty dollars of the current gold coin of the United States," etc.

The court recognized the general rule, as to the description of coin, when the subject of larceny, but said: "We have a piece of money of the gold coin called a dollar; and is it not just as intelligible to say 'sixty dollars of the gold coin,' as to say 'sixty pieces of gold coin called sixty dollars?' In our opinion the indictment is unobjectionable."

Mr. Bishop, commenting on this case, says: "If the expression, 'sixty dollars of the current gold coin of the United States' really meant, as the court seems to have understood it to mean, that the theft was of sixty distinct pieces of gold coin, each piece being of the value of a dollar, then the indictment was good according to the general doctrine."

But this Indiana indictment, it may be observed, is more specific in the description of the subject of the larceny than the one before us. "Sixty dollars of the current gold coin of the United States, of the value of sixty dollars," is a much more definite description of money than "one hundred and thirty dollars, of the value of one hundred and thirty dollars."

We can find in no text-book of precedents for indictments as loose and vague a description of money, when the subject of larceny, as the indictment before us.

The judgment must be reversed, and the cause remanded to the Pulaski circuit court (to which the jurisdiction of the Pulaski criminal court is transferred by the new constitution), with instructions to the court to arrest the judgment, and hold the appellant subject to a new indictment.

LOWE v. STATE.

(57 Geo., 171.)

LARCENY: *Duplicity—Sufficiency of proof.*

An indictment for simple larceny in stealing two hogs at the same time and place, though alleging that one is the property of one person, and the other of another, covers but one transaction and charges but one offense, and judgment thereon will not be arrested.

Proof that defendant stole one of the hogs is sufficient to convict under such an indictment.

JACKSON, J. The indictment alleged that the defendant stole two hogs belonging to different owners, on the same day, and in the same county. He was found guilty, and moved to arrest the judgment on the ground that two offenses were charged.

1. We think the indictment covers one transaction and charges but one offense, and is good—certainly good as against a motion to arrest the judgment after verdict.

2. The proof only justified the conviction for stealing one of the hogs. The penalty or punishment prescribed by the law, and inflicted by the judge, being the same whether one or both were stolen, the verdict is sustained by the evidence, and the motion for a new trial on this ground was properly overruled.

Judgment affirmed.

LOOMIS v. PEOPLE.

(67 N. Y., 322.)

LARCENY: *By a trick.*

Where two conspire together to fraudulently obtain the money of the prosecutor, and, in pursuance of the conspiracy, make believe to throw dice with one another for money, and one of them, apparently losing, persuades the prosecutor to let him have his money to bet on the game, on the false assurance that he is sure to win and will give it back immediately, and if he loses he has a check for \$500 in his pocket which he will get cashed and repay the money, and the money is apparently lost, soon after which the confederates disappear, the two thus conspiring are guilty of larceny.

MILLER, J. The prosecutor was induced to place his money upon a game of hazard upon the assurance of Lewis, one of the prisoners, that he was to win, and he would have his money back, or that, in case of loss, other money would be procured upon a check which Lewis claimed to have in his possession, and paid in place of that lost.

It is evident that the prisoner Lewis and his confederate Loomis conspired fraudulently and feloniously to procure the money of the prosecutor, and by means of a trick and device succeeded in converting it to their own use. Upon the facts proven the question to be determined is, whether a case of larceny is established. The jury have found that it was the intention of the prisoners to convert the money without the consent and against the will of the prosecutor, and that he did not intend to part with his property. I think that the conclusion at which they arrived was abundantly warranted by the evidence, and the conviction of the prisoners can be upheld upon well-established legal grounds. It is contended that the conviction was erroneous, because the prosecutor voluntarily parted with his money, not expecting to receive back the same bills, but others in their place, and hence the crime was not made out. It must be conceded that, in order to establish the offense of larceny, there must be a trespass, and without this element the offense is not complete: 1 Hawk. Pl. Cr., section 1, p. 108; 2 Russ. on Crimes (5th Am. ed.), 95; *McDonald v. The People*, 43 N. Y., 61; *Hildebrand v. The People*, 56 *Id.*, 394. Even although the owner is induced to part with his property by fraudulent means, yet if he actually

intends to part with it, and delivers up possession absolutely, it is not larceny: *People v. Smith*, 53 N. Y., 111.

In this case, considering the circumstances, it cannot be deemed, we think, that the prosecutor intended to part with the possession or the ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title, and it was only in case of its loss that other money was to be procured upon the check, which the prisoner Lewis claimed to have in his possession. The prosecutor then had parted with no absolute right to the same, nor transferred any title to the bills before the contingency of the loss occurred, and the use of the money was but temporary, and for a specified object. Certainly, when it appeared that no loss had happened, the temporary possession was at an end, and to all intents and purposes the money reverted to the prosecutor. The alleged loss, brought about by the criminal and fraudulent conduct of the prisoners, could not change the title, or in any way transfer the ownership to them. They did not thereby acquire any right, and it cannot seriously be questioned that at this time, if not before, the prosecutor would have been justified in taking the money forcibly, or could have maintained an action for the recovery of the same identical bills. It was his money, and the conversion of it by the prisoners, before it was won, was without a semblance of lawful authority, and, as the jury had found, with a felonious intent.

It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover, a device and contrivance to conceal the original design, and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting and the offense is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet, as is well said by a writer upon criminal law:

"It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, and then converts it to his own use. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver

the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against the will of the owner, and is a trespasser, because a trespasser upon the property of another is only doing some act upon that property against the will of the owner."

In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title. It was passed over for a mere temporary use at most, and the legal title remaining in the owner, the conversion of it by the prisoners within the rule cited, was larceny. The reports are full of familiar illustrations of this rule, as a reference to some of the leading cases will show. In *Hildebrand v. The People, supra*, a fifty-dollar bill delivered to the prisoner to pay ten cents and return the change, was kept by him, and it was held to be larceny. It was intended that after taking out the ten cents other money should be exchanged, and to this extent and for this purpose the prisoner had lawful possession of the money. In that case, as here, the money was not absolutely parted with, but surrendered for a specific purpose and the custody temporarily transferred. It is true that in the case last cited, the delivery was held not to be complete until the change was returned, but that does not alter the principle when there was but a temporary possession, as there was no transfer of the ownership. See, also, *McDonald v. The People, supra*. Nor does it change the aspect of the case when, by trick or device, the owner is induced to part with the custody or naked possession of property for a special purpose to one who receives it *animus furandi*, and still means to retain a right of property: *Smith v. The People*, 53 N. Y., 111. In *Rex v. Horner* (1 Leach, 305), where the prosecutor was decoyed into a public house and money obtained from him for the purpose of playing at cards, and appropriated by the prisoner, it was held that if there was a preconceived plan to obtain the money, and an *animus furandi*, it was felonious. This case is analogous and directly in point, and it is difficult to draw any distinction between the case cited and the case at the bar, as there was quite as strong ground for finding the felonious intent in the latter case as in that cited.

In *Ree v. Robson*, R. & R. C. C., 413, where there was a plan to cheat the prosecutor out of his property under color of a bet, and he parted with the possession only to deposit it as a stake with one of the confederates, the taking was held to be felonious. This case is directly in point, and as a decision by the twelve judges is entitled to great weight. The case referred to, without citing others which bear in the same direction, are sufficient to sustain the conviction, and the cases which have been cited as upholding the principle that there was no such parting with the property as to constitute larceny, do not, I think, go to the extent which is claimed. After a careful examination, without considering them in detail, suffice it to say, that perhaps a single exception (*Reg. v. Thomas*, 9 C. & P., 741), which was a *nisi prius* decision, and is criticised in the opinion in *Hildebrand v. The People*, they are all clearly distinguishable from the case now considered, and the weight of authority is decidedly in an opposite direction.

There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses. It will be observed that the *intention* of the owner to part with his property is the gist and essence of the offense of larceny, and the vital point upon which the crime hinges and is to be determined. Although the present case is on the border line, yet it is quite clear that it was, as the evidence stood, a fair question for the jury to decide as to the intent of the prisoners feloniously to take the money, and as to the intention of the prosecutor to part with the ownership of the same.

These questions were fairly submitted by the judge to their consideration, and as there was no error in the charge, or in any other respect on the trial, the conviction must be affirmed.

All concur; RAPALLO, J., absent.

Judgment affirmed.

STANLEY v. STATE.

(24 Ohio St., 186.)

LARCENY: *Bringing into the state property stolen in a foreign country.*

In the absence of a statute, the thief cannot be convicted of larceny in Ohio, for bringing into Ohio property stolen by him in Canada.

McILVAINE, J. At the November term, 1873, of the court of common pleas of Cuyahoga county, the plaintiff in error, William Stanley, was convicted of the crime of grand larceny, and sentenced for a term of years to the penitentiary.

The indictment upon which he was convicted charged "that William Stanley, late of the county aforesaid, on the twentieth day of June, in the year one thousand eight hundred and seventy-three, at the county aforesaid, with force and arms," certain silverware, "of the goods and chattels and property of George P. Harris, then and there being, then and there unlawfully and feloniously did steal, take and carry away," etc.

The following facts were proven at the trial:

1. That the goods described in the indictment belonged to Harris, and were of the value of one hundred and sixty-five dollars.

2. That they were stolen from Harris on the 20th of June, 1873, at the city of London, in the Dominion of Canada.

3. That they were afterwards, on the 26th day of same month, found in the possession of the defendant, in said county of Cuyahoga. It is also conceded that, in order to convict, the jury must have found that the goods were stolen by the defendant in the Dominion of Canada, and carried thence by him to the state of Ohio.

Upon this state of facts, was the prisoner lawfully convicted? In other words, if property be stolen at a place beyond the jurisdiction of this state, and of the United States, and afterward brought into this state by the thief, can he be lawfully convicted of larceny in this state?

In view of the free intercourse between foreign countries and this state, and the immense immigration and importation of property from abroad, this question is one of very great importance; and, I may add, that its determination is unaided by legislation

in this state. In resolving this question, we have been much embarrassed by a former decision of this court, in *Hamilton v. The State*, 11 Ohio, 435. In that case it was held by a majority of the judges, that a person having in his possession, in this state, property which had been stolen by him in another state of the Union, might be convicted here of larceny.

The decision appears to have been placed upon the ground, "that a long-sustained practice, in the criminal courts of this state, had settled the construction of the point, and established the right to convict in such cases."

Whether that decision can be sustained upon the principles of the common law or not, it must be conceded that for more than thirty years it has stood, unchallenged and unquestioned, as an authoritative exposition of the law of this state. And although it has received no express legislative recognition, it has been so long followed in our criminal courts, and acquiesced in by other departments of the government, that we are inclined to the opinion that it ought not now to be overruled; but, on the other hand, its rule should be applied and sustained, in like cases, upon the principle of *stare decisis*.

Before passing from *Hamilton v. The State*, it should be added that the same question has been decided in the same way by the courts of several of our sister states.

The State v. Ellis, 3 Conn., 185; *The State v. Bartlett*, 11 Vt., 650; *The State v. Underwood*, 49 Me., 181; *Watson v. The State*, 36 Miss., 593; *The State v. Johnson*, 2 Oregon, 115; *The State v. Bennett*, 14 Iowa, 479; *Ferrel v. Commonwealth*, 1 Duvall, 153; *Commonwealth v. Collins*, 1 Mass., 116. The same point has been decided the same way in several subsequent cases in Massachusetts. The exact question, however, now before us has not been decided by this court; and we are unanimously of opinion that the rule laid down in *Hamilton v. The State* should not be extended to cases where the property was stolen in a foreign and independent sovereignty.

We are unwilling to sanction the doctrine or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction and a mere fiction, be treated as an offense committed within this state, and in violation of the laws thereof. In this case the goods were stolen in Canada. They were there taken from the custody of the owner into the custody of the thief. The change

of possession was complete. The goods were afterward carried by the thief from the Dominion of Canada to the state of Ohio. During the transit his possession was continuous and uninterrupted. Now, the theory upon which this conviction is sought to be sustained is, that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of the law only. The fact was otherwise. A further theory in support of the conviction is, that as soon as the goods arrived within the state of Ohio, the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it.

That the right of possession, as well as the right of property, remained all the time in the owner is true, as matter of law. And it is also true, as a matter of fiction, that the possession of the thief, although exclusive as it must have been in order to make him a thief, is regarded as the possession of the owner, for some purposes. Thus, stolen goods, while in the possession of the thief, may be again stolen by another thief; and the latter may be charged with taking and carrying away the goods of the owner. And for the purpose of sustaining such charge, the possession of the first thief will be regarded as the possession of the true owner. This fiction, however, in no way changes the nature of the facts which constitute the crime of larceny.

What we deny is, that a mere change of place by the thief, while he continues in the uninterrupted and exclusive possession of the stolen property, constitutes a new "taking" of the property, either as matter of fact or of law.

Larceny, under the statute of this state, is the same as at common law, and may be defined to be the felonious taking and carrying away of the personal property of another. But no offense against this statute is complete until every act which constitutes an essential element in the crime has been committed within the limits of this state. The act of "taking" is an essential element in the crime, and defines the act by which the possession of the property is changed from the owner to the thief. But the act of "taking" is not repeated, after the change of possession is once complete, and while the possession of the thief continues to be exclusive and uninterrupted. Hence, a bailee or finder of goods, who obtains complete possession without any fraudulent intent,

can not be convicted of larceny by reason of any subsequent appropriation of them.

We fully recognize the common law practice, that when property is stolen in one county, and the thief is afterward found in another county with the stolen property in his possession, he may be indicted and convicted in either county, but not in both. This practice obtained, notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The reason for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offense. We are entirely satisfied, however, that the right to prosecute the thief in any county wherein he was found in possession of the stolen property, was not asserted by the crown, because of the fact that a new and distinct larceny of the goods was committed whenever and wherever the thief might pass from one county into another. His exemption from more than one conviction and punishment makes this proposition clear enough. The common law provided that no person should be twice vexed for the same cause. It was through the operation of this principle that the thief, who stole property in one county and was afterward found with the fruits of his crime in another, could not be tried and convicted in each county. He was guilty of one offense only, and that offense was complete in the county where the property was first "taken" by the thief, and removed from the place in which the owner had it in possession.

When goods piratically seized upon the high seas were afterwards carried by the thief into a county of England, the common law judges refused to take cognizance of the larceny, "because the original act, namely, the taking of them, was not any offense whereof the common law taketh knowledge, and by consequence, the bringing them into a county, could not make the same a felony punishable by our law:" 13 Coke, 53; 3 Inst., 113; 1 Hawk., c. 19, sec. 52.

The prisoner was charged with larceny at Dorsetshire, where he had possession of the stolen goods. The goods had been stolen by him in the island of Jersey, and afterward he brought them to Dorsetshire. The prisoner was convicted. All the judges (except Raymond, C. B., and Taunton, J., who did not sit) agreed that the conviction was wrong: *Reg. v. Prowes*, 1

Moody C. C., 349. Property was stolen by the prisoner in France, and was transported to London, where it was found in his possession. Parke, B., directed the jury to acquit the prisoner on the ground of the want of jurisdiction, which was done: *Regina v. Madge*, 9 Cow. and P., 29.

A similar decision was made in a case where the property was stolen in Scotland, and afterward carried by the thief into England: 2 East P. C., 772, c. 16, sec. 156.

This rule of the common law was afterward superseded, in respect to the United Kingdom, by the statutes of 13 Geo. III., c. 31, sec. 4, and 7 and 8 Geo. IV., c. 29, sec. 76, whereby prosecutions were authorized in any county in which the thief was found, in possession of property stolen by him in any part of the United Kingdom. In *Commonwealth v. Uprichard*, 3 Gray, 434, the property had been stolen in the province of Nova Scotia, and thence carried by the thief into Massachusetts. The defendant was convicted of larceny, charged to have been committed in the latter state. This conviction was set aside by a unanimous court, although two decisions had been made by the same court affirming convictions, where the property had been stolen in a sister state, and afterward brought by the thief into that commonwealth. Without overruling the older cases, Chief Justice Shaw, in delivering the opinion of the court, distinguished between the two classes of cases. The following cases are in point, that a state, into which stolen goods are carried by a thief from a sister state, has no jurisdiction to convict for the larceny of the goods, and *a fortiori* when the goods were stolen in a foreign country.

In New York: *People v. Gardner*, 2 Johns., 477; *People v. Schenk*, 2 Johns., 479. The rule was afterward changed in that state by statute. New Jersey: *The State v. Le Blanch*, 2 Vroom, 82. Pennsylvania: *Simmons v. Commonwealth*, 5 Binn., 617. North Carolina: *The State v. Brown*, 1 Hayw., 100. Tennessee: *Simpson v. The State*, 4 Humph., 456. Indiana: *Beall v. The State*, 15 Ind., 378. Louisiana: *The State v. Rounalls*, 14 L. Ann., 278.

There are two cases sustaining convictions for larceny in the states, where the property had been stolen in the British provinces: *The State v. Bartlett*, 11 Vermont, 650, and *The State v. Underwood*, 49 Maine, 181. In Bartlett's case, the principle is doubted, but the practice adopted in cases where the property

was stolen in a sister state was followed, and the application of the principle thereby extended. Underwood's case was decided by a majority of the judges. After reviewing the cases, we think the weight of authority is against the conviction and judgment below. And in the light of principle, we have no hesitancy in holding that the court below had no jurisdiction over the offense committed by the prisoner. The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offense, was committed within the state of Ohio, and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal, of the goods alleged in this case to have been stolen, was at a place beyond the limits of the state, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original "taking," and the original transportation of the goods by the prisoner must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant before they were brought into this state, was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortious. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was *stolen* in Canada by the prisoner.

By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this state? Certainly not. The criminal laws of this state have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this state.

Shall the question, whether or not the "taking" of the property by the prisoner was a crime in Canada, be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of facts of which Stanley was found guilty, was in violation of the laws of Canada,

but not of this state, and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this state were essential elements in his offense; therefore, no complete offense was committed in this state against the laws thereof.

I have no doubt the legislature might make it a crime for a thief to bring into this state property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offense. But that offense would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the *common law*, without reference to any other law, or the laws of any other country. It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this state has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in violation of the rights of the owner; but our criminal courts have no jurisdiction over offenses committed against the sovereignty of foreign and independent states.

Judgment reversed, and cause remanded.

DAY, C. J., WELCH, STONE and WHITE, JJ., concurring.

NOTE.—In *Morrissey v. People*, 11 Mich., 327, the Supreme Court of Michigan was evenly divided on the question, whether a statute providing for the punishment, in Michigan, of persons who, having committed a larceny in a foreign country, brought the stolen property into the state, was constitutional. But the majority of the court concurred in reversing the judgment in that case on the ground that the information was fatally bad, inasmuch as it simply charged a larceny in Michigan in the ordinary form; while the court held that all the facts necessary to bring the case within the statute, *i. e.*, the larceny in Canada, and the bringing of the stolen property into the state, must be set out in the information.

WILSON V. STATE.

(45 Tex., 77.)

LARCENY: *Autrefois convict.*

Where a person steals articles belonging to different persons at the same time and place, so that the whole constitutes but one transaction, he has committed but one larceny, and, after trial and conviction for stealing a part of the property, the conviction may be pleaded in bar of a second indictment, charging the larceny of the other property taken at the same time and place.

REEVES, Associate Justice. In this case there was no appearance for the appellant. The case was submitted for the state on the brief of the assistant attorney-general.

There were two indictments pending in the criminal court of Dallas City, against the appellant. In the first one, numbered on the docket of the criminal court 2,398, the defendant was charged with the theft of a gelding belonging to Granville Criner, charged in the indictment to have been taken from the possession of D. N. Harden, who, as averred, was holding the animal for the owner. The other indictment, numbered on the docket 2,399, and found at the same term of the court, charged the defendant with theft of a saddle, bridle and blanket, one pair of saddle-bags, one umbrella, three shirts, one pair pants, two pairs of drawers, belonging to D. N. Harden, and taken from his possession on the 10th day of July, 1874, being the same day the gelding was stolen from him.

It appears that the defendant was first put upon his trial on indictment number 2,399, charging him with stealing the saddle, bridle and blanket, etc., on which charge he was convicted by the jury, and his punishment assessed at a fine of one hundred dollars and one year's confinement in the county jail; and, by the judgment of the court, he was remanded to the custody of the sheriff until the fine and costs were paid, and for the further term of one year, according to the verdict of the jury.

On his trial for stealing the gelding, as charged in indictment number 2,398, the defendant pleaded the former conviction on the indictment number 2,399, as a bar, and asked to be discharged from further prosecution, because the offense for which he had been tried and convicted was, in fact and in law, the same offense

of which he then stood charged. Upon the motion of the district attorney the plea was stricken out by the court. The case being submitted to a jury, a verdict was returned assessing the punishment at fifteen years' confinement in the penitentiary. The motion for a new trial being overruled, the defendant has appealed. The court did not err in refusing to give the special charges asked by the defendant, being one of the grounds of the motion for a new trial.

The first charge asked by the defendant was to the effect that the state could only prove that Granville Criner, the owner, did not give his consent to defendant to take the gelding, by Criner himself, or by the confession of the defendant. The court instructed the jury "that the want of the owner's consent could be established by the evidence of the party from whom the property was taken, or the party who was the owner, or it may be established by facts and circumstances, provided such circumstances so proven are of such a nature as to exclude absolutely every reasonable presumption that the owner gave his consent to the taking."

The appellant has no just ground to complain of this charge: *Lawrence v. The State*, 4 Yerg., 145; *Free v. The State*, 13 Ind., 324.

The second charge refused was given substantially in the general charge, and the court was not required to repeat it.

The fourth ground of the motion for a new trial presents the material question in the case, to wit: Because the court erred in striking out defendant's plea of *autrefois convict*.

Wharton, in his work on American Criminal Law (vol. 1, sec. 570), says: "Whenever the offenses charged in the two indictments are capable of being legally identified as the same offense by averments, it is a question of fact for a jury to determine whether the averments be supported and the offenses be the same. In such cases the replication ought to conclude to the country. But when plea of *autrefois acquit* upon its face shows that the offenses are legally distinct, and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel* record may conclude with a verification. In the latter case the court, without the intervention of a jury, may decide the issue." The same rules apply to the plea of *autrefois convict*.

"The plea," says Bishop, "must set out the record of the

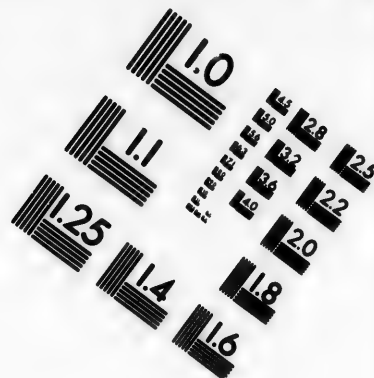
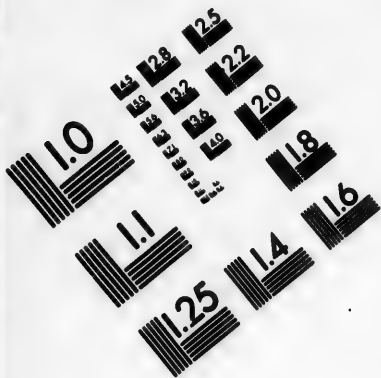
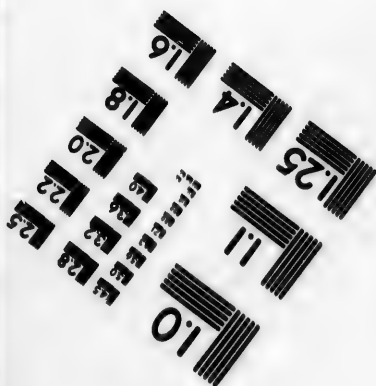
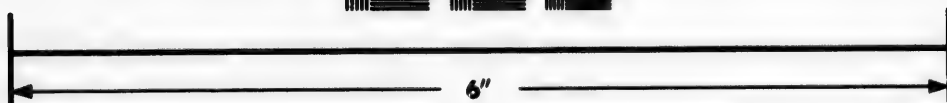
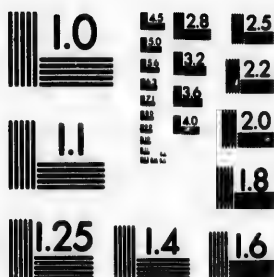


IMAGE EVALUATION TEST TARGET (MT-3)



**Photographic
Sciences
Corporation**

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1.4 1.5 1.6 1.7 1.8 1.9 2.0 2.1 2.2 2.3 2.4 2.5 2.6 2.7 2.8 2.9 3.0 3.1 3.2 3.3 3.4 3.5 3.6 3.7 3.8 3.9 4.0 4.1 4.2 4.3 4.4 4.5 4.6 4.7 4.8 4.9 5.0 5.1 5.2 5.3 5.4 5.5 5.6 5.7 5.8 5.9 6.0 6.1 6.2 6.3 6.4 6.5 6.6 6.7 6.8 6.9 7.0 7.1 7.2 7.3 7.4 7.5 7.6 7.7 7.8 7.9 8.0 8.1 8.2 8.3 8.4 8.5 8.6 8.7 8.8 8.9 9.0 9.1 9.2 9.3 9.4 9.5 9.6 9.7 9.8 9.9 10.0

1.4 1.5 1.6 1.7 1.8 1.9 2.0 2.1 2.2 2.3 2.4 2.5 2.6 2.7 2.8 2.9 3.0 3.1 3.2 3.3 3.4 3.5 3.6 3.7 3.8 3.9 4.0 4.1 4.2 4.3 4.4 4.5 4.6 4.7 4.8 4.9 5.0 5.1 5.2 5.3 5.4 5.5 5.6 5.7 5.8 5.9 6.0 6.1 6.2 6.3 6.4 6.5 6.6 6.7 6.8 6.9 7.0 7.1 7.2 7.3 7.4 7.5 7.6 7.7 7.8 7.9 8.0 8.1 8.2 8.3 8.4 8.5 8.6 8.7 8.8 8.9 9.0 9.1 9.2 9.3 9.4 9.5 9.6 9.7 9.8 9.9 10.0

former conviction or acquittal, including the caption and indictment, and allege that the two offenses are the same, and that the defendant in the former is the same person who is the defendant in the latter:" 1 Bishop's Cr. Pro., secs. 814, 816.

"When there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are either true or untrue:" Code Cr. Pro., art. 3091, Paschal's Dig.

In the case of *Davis v. The State*, 42 Texas, 494, the court said: "It would certainly be most in harmony with our general practice to submit both issues (the plea of not guilty, and plea of former conviction) to the jury, with directions to first consider the special plea; and if they found that to be true, to proceed no further than to return their verdict upon it. The rule to be deduced from the authorities is, that where the offenses charged in different indictments are so diverse as not to admit of proof that they are the same, the court may decide the issue without submitting it to a jury.

In the case of *Boggess v. The State*, from McLennan county, decided at Austin (43 Tex., 347), the action of the court sustaining exceptions to the plea was held to be correct.

In the case at bar we are not able to say that it necessarily appears by the record that the offenses are incapable of identification. The plea alleges that they are the same, and that the defendant is the same person in both indictments. The theft, as alleged in both indictments, is charged to have been committed on the same day, and from the same person. In one case he was the owner of the property, and in the other he was in possession, and holding the same for the owner, according to the allegations of the indictment.

If we look to the evidence, on the trial, for the theft of the gelding, as may be done in considering the motion for a new trial, it will be seen that D. N. Harden, from whose possession the property was taken, testified that a new saddle, a pair of saddle-bags filled with clothing, a blanket, and an umbrella, strapped on the saddle, were on the horse at the time he was taken, being in part such articles as are described in the indictment. The saddle-bags may have contained the other articles mentioned in the indictment. The horse and the saddle and saddle-bags belonged to Granville Criner, leaving it to be inferred

that the other articles belonged to the witness Harden, as averred in the indictment.

"To sustain this plea (*autrefois convict* or *acquit*), it is not sufficient simply to put in the former record; some evidence must be given that the offenses charged in the former and present indictments are the same. This may be done by showing, by some person present at the former trial, what was the offense actually investigated there; and, if that is consistent with the charge in the second indictment, a presumptive case will thus be made out, which must be met by proof on the other side, of the diversity of the two offenses." 1 Bishop's Cr. Pro., sec. 816. Both of the pleas of former conviction, and not guilty, should have been submitted to the jury for their action, under the direction of the court, as indicated in the opinion.

As the case must be reversed for the error in striking out the plea of former conviction, it becomes necessary to inquire as to what effect shall be given to the plea if found to be true. On the supposition that the horse and saddle and saddle-bags belonged to Criner, and the other articles belonged to Harden, and that all were taken at some time and place, and from the possession of the same person, the question would be whether the taking in the supposed case would be distinct larcenies, or only one offense. The authorities are found to be conflicting on the question.

Wharton says: "Where a man simultaneously steals two articles—e. g., a horse and a saddle together—he may be convicted on separate indictments for each offense" (sec. 565, referring to *The State v. Thurston*, 2 McM. [South Carolina], 382). In this case the defendant was indicted for stealing cotton belonging to three different individuals, and was convicted in the three cases; and the conviction in one case was held to be no bar to the conviction in the two other.

The court said: "The stealing of the goods of different persons is always a distinct felony, or may, at least, be so treated by the solicitor, if in his discretion he thinks proper so to do." Wharton also refers to the case of *The Commonwealth v. Andrews*, 2 Mass., 409—an indictment for receiving stolen goods belonging to different persons.

These cases and some others, citing English authority, sustain the doctrine contended for. The great weight of American authorities is believed to be the other way.

In *The State v. Williams*, 10 Humph., 101, a case for stealing

a gelding, one saddle, one blanket, a bridle and martingale, the court said: "The crime is single. All the things are charged to have been taken at the same time, the same place, and to have been the property of the same individual. The crime being one, is indivisible; that is, the state could not maintain separate prosecutions against the prisoner for stealing the horse, for stealing the saddle, for stealing the blanket, for stealing the bridle, for stealing the martingale; for this would be to punish him five times for one offense; and yet this would be the consequence, if the positions assumed in behalf of the prisoner were sustained."

Also, *Lorton v. The State*, 7 Mo. Rep., 55, Lorton was indicted by the grand jury of St. Louis county, for stealing the goods of Richard Curle, and, at the same time, was indicted for stealing the goods of John B. Gibson. The defendant pleaded guilty to the first indictment, and, to the second, pleaded a former conviction for the same offense. The prisoner had been sentenced, under the first indictment, to two years' imprisonment in the penitentiary. On the second trial he asked the court to instruct the jury that if they believed, from the evidence, that the goods of Curle and Gibson were stolen at one and the same time, then the circumstance of said goods belonging to separate owners did not constitute several offenses, and that if any person, by the same act, and at the same time, should steal the goods of A, B and C, this constituted but one felony or offense against the state; and that if they should believe, under the preceding instruction, that the stealing of the goods of said Curle and Gibson was one transaction, then the former conviction of the prisoner operated as a bar. This instruction was refused. On appeal to the Supreme Court, it was held that the instruction should have been given.

The Supreme Court said: "The stealing of several articles of property, at the same time and place, undoubtedly constitutes but one offense against the law; and the circumstance of several ownerships cannot increase or mitigate the nature of the offense."

In the general form of indictment at common law, for larceny, the goods are described as belonging to different owners: 3 Chitty's Cr. Law, 959. Under this form is found the following note: "Where several persons' goods are taken at the same time, so that the transaction is the same, the indictment may properly include the whole; but not so, if the takings were at different times." Here the stealing of the goods of different

persons, at the same time, is treated as grand larceny, and as being but one transaction.

In the case of *Jackson v. The State*, and the case of *Lanpher v. The State*, 14 Ind. R., 327, reporting but one of the cases, the indictment charged the defendant with stealing two horses. It appeared that he stole, with the horses, saddles and bridles, though not so charged in the indictment, and this was objected to as a fatal variance. The court held "that the omission to include in the indictment other articles stolen at the same time, and forming a part of a single offense, was for the defendant's benefit, if it had any bearing in the case. The state cannot split up one crime and prosecute it in parts. A prosecution, for any part of a single crime, bars any further prosecution based upon the whole or a part of the same crime."

Also, *Roberts & Copenherden v. The State of Georgia*, 14 Ga., 12. In this case the court said: "The plea of *autrefois acquit* or *convict*, is sufficient, whenever the proof shows the second case to be the same transaction with the first."

On the same point, 2 Graham & Waterman on New Trials, 54, 55.

Our conclusion is, that the stealing of different articles of property belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the state, and that the accused cannot be convicted on separate indictments, charging different parts of one transaction as a distinct offense. A conviction on one of the indictments bars a prosecution on the others.

Whether or not the appellant can bring his case within this rule can only appear on another trial.

The present case does not affect the punishment of theft, under specified circumstances, as where it is coupled with burglary, and the punishment is doubled, as provided by the statute.

It is not necessary to decide to what extent offenses, other than theft, may come within the scope of this opinion.

For the error in striking out the special plea in bar, the case is reversed and remanded.

Reversed and remanded.

HUTCHINSON V. COMMONWEALTH.

(82 Pa. St., 472.)

LARCENY: *Bailees—Agents—Trustees—Writ of error allowable nunc pro tunc—Demurrer to evidence.*

Where, by an oversight, there was no formal allowance of a writ of error, but the court can see that it would and should have been allowed, on a motion to quash the writ of error for want of an order allowing it, the court will make the order of allowance *nunc pro tunc*.

Where the defendants received an accepted order for so many barrels of crude petroleum, which, at the time, was in the tanks and pipes of the Union Pipe Line Co., mixed with petroleum belonging to many others, the defendants receiving the accepted order on an agreement to store the petroleum represented by the order at a specified rate per month, the delivery of the order is a delivery of the petroleum sufficient to constitute the defendants' bailees, and if by means of the order they draw and receive the petroleum from the Pipe Line Co., and convert it to their own use, they are guilty of larceny as bailees.

Embezzlement by trustees being a different offense from embezzlement by agents, a count which charges the defendants with embezzlement "as trustees and agents," charges two distinct offenses, and is bad for duplicity.

Where in a criminal prosecution the defendant demurs to the evidence, he waives his right to have the jury pass upon the case; and it is proper for the court to discharge the jury and give judgment upon the whole case, upon the facts as well as upon the law.

PAXSON, J. There was a *certiorari* as well as writ of error in this case. The former was specially allowed by our brother Williams at chambers. There was no allowance of the writ of error, although issued simultaneously with the *certiorari*. This was evidently an oversight. The commonwealth moved to quash both writs, and assigned as reason therefor: 1. Informality in the allowance of the writs; and, 2. That neither *certiorari* nor writ of error would lie in the case.

The objections are purely formal, and inasmuch as the record presents a proper case for review, we have no hesitation in allowing the writ of error *nunc pro tunc*. The act of 19th May, 1874 (Pamph. L., 219), makes ample provision for writs of error and *certiorari* in criminal proceedings. In all cases of felonious homicide, and in all other such criminal cases as are triable exclusively in the oyer and terminer, said writs are of

right. In all other criminal cases, they may be issued whenever allowed by this court, or a judge thereof.

Upon the trial in the court below, a motion was made on behalf of the defendants to quash the bill of indictment. The motion was refused, and this ruling of the court forms the subject of the first seven specifications of error. We are of opinion that the first, third and fourth counts are fatally defective, and ought to have been quashed. The first count charges the defendants with embezzlement "as trustees and agents." Here is a blending of two offenses in one count, which is not allowed in criminal pleading. Embezzlement by trustees is one offense; embezzlement by agents is another, and indictable under a different section of the code. Offenses which are a part of the same transaction may be joined in the same indictment, when it is triable in the quarter sessions, even though one of said offenses be a felony: *Hunter v. Commonwealth*, 29 P. F. Smith, 503. This, however, does not justify the joining of separate offenses in one count. The third count charges the defendants with embezzlement as bailees. There is no such offense at common law, or under the code. The fourth count charges the defendants with embezzlement as "trustees, agents and bailees." This is defective, for the reason stated in regard to the first count.

The second count is, perhaps, sufficient in point of law. It charges embezzlement as "agents." It is, however, of no practical importance, as there was no evidence to support it. The defendants were not the "agents" of the prosecutor. This obviates the necessity of any discussion as to whether the defendants were professional agents. This conviction, if sustained at all, must rest solely upon the fifth and last count of the indictment. This count charges the defendants with larceny as bailees. It is true the blunder of joining the words "bailees and agents" is again repeated, but we think with a different result. There is not a blending of two or more separate offenses in the one count, as is the case in the first and fourth counts. There is no section of the code which defines and punishes such an offense as larceny by "agents." Hence, the word "agents" does not introduce another offense into this count, and may be rejected as surplusage. This brings us to the important question in the case, viz.: was the evidence for the commonwealth sufficient to sustain a conviction of larceny as bailees? The defendants demurred to the evidence, and the district attorney having joined therein, the

court discharged the jury and gave judgment for the commonwealth upon the demurrer. The discharge of the jury is one of the errors assigned. In this we think the court below was right. It is true, a jury are not only judges of the facts in a criminal case, but they are also judges of the law, under the advice and instruction of the court. It was in the power of the defendants to require the jury to pass upon the whole case. But they waived this right by their demurrer to the evidence. By this act they threw the decision of both the law and the facts upon the court, and the discharge of the jury was entirely proper. They had no further functions to perform: *Commonwealth v. Parr*, 5 W. and S., 345. In the consideration of the question, whether the court below was right in adjudging the defendants guilty under the evidence, the first thought that naturally suggests itself is, was there a bailment of the oil? This involves a brief statement of the facts as proved upon the trial, and admitted by the demurrer.

On the 13th of July, 1874, R. L. Bishop, the prosecutor, was the owner of 1,083 barrels of crude petroleum. This oil was in the pipes or tanks of the Union Pipe Line, and Mr. Bishop held as the evidence of his title, two accepted orders on said company. On the day above named, Mr. Bishop delivered these orders to the firm of Hutchinson & Batchelder, the defendants, and took from them the following receipt:

"PARKER'S LANDING, PA., July 13th, 1874.

"Received of Mr. R. L. Bishop, ten hundred and eighty-three $103\frac{13}{100}$ barrels of united oil, pipage unpaid, to be held for storage on the following terms: five cents a barrel per month, or fifty cents for twelve months.

"HUTCHINSON & BATCHELDER."

On the 13th of August, 1874, the defendants received from the prosecutor $103\frac{13}{100}$ barrels of petroleum, in the same manner and upon the same terms. At the time of the delivery of the said accepted orders, the oil referred to was in the numerous tanks or lines of pipes of the Union Pipe Line Company, and were wholly indistinguishable from the thousands of barrels of other oil in said pipes or tanks. After the defendants received the orders, they deposited them to the credit of their general account with the pipe line, and thereafter continued to deposit and draw until the spring of 1875, when defendants became

financially embarrassed. In order to meet their engagements, they continued to draw upon the balance in their favor on the books of the pipe line until their failure in August, 1875. When the prosecutor demanded his oil, they were unable to deliver it, for the reason that they had drawn all, or nearly all, the oil out of the pipes to pay their debts. The case presented by this brief statement is believed to be without precedent. Of all the numerous cases in the books, I have found no one that resembles it in all its essential features. If we take the receipt of the defendants as conclusive upon them, it would establish a bailment. But a receipt has never been held to be conclusive, even in a civil case. The explanation of it furnished by the evidence in the case, discloses substantially the facts above stated. It was contended, on behalf of the defendants, that there was no bailment, because there was no separation of the prosecutor's oil from the immense quantity of other oil in the pipes and tanks of the Pipe Line Company, and that as a sequence there was no delivery. This is the vital point in the case. If there was no delivery of the oil there was no bailment. We have a long line of cases in England and this country involving the question as to how far a sale of goods is complete when the article sold has not been separated from other goods or property of like character. The subject is discussed at considerable length, and the authorities reviewed by Mr. Justice Rogers, in *Hutchinson v. Hunter*, 7 Barr, 140. The rule which is there deduced from the authorities is, that "the goods sold must be ascertained, designated and separated from the stock or quantity with which they are mixed before the property can pass. Until this be done, it remains the property of the vendor, and if destroyed by fire or otherwise, it is the loss of the vendor and not of the vendee."

This was undoubtedly the proper rule to apply to the case before the court, in *Hutchinson v. Hunter*. The merchandise which had been sold consisted of one hundred barrels of molasses, out of a lot of one hundred and twenty-five barrels. The barrels varied in quantity, and had not been gauged; were not separated or marked, nor were any particular barrels agreed upon. The facts brought the case precisely within the rule laid down by Chancellor Kent (2 Com., 496): "If anything remains to be done between the seller and the buyer before the goods are to be delivered, a present right of property does not attach to the buyer. The goods sold must be ascertained, designated and

separated from the stock in quantity with which they are mixed before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales, that if goods be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified." This principle runs through all the cases upon this subject, and is too firmly established to be shaken. Nor are we disposed to question its soundness. If this cannot be distinguished from those to which the rule has heretofore been applied, there was neither a delivery nor a bailment of the oil. An examination of our own, as well as the English cases, discloses the fact that, as between the vendor and vendee, something remained to be done in order to ascertain the property and render the delivery complete. In *Smith v. Craig*, 3 W. & S., 14, the rum and molasses were to be gauged, and the price fixed at the purchaser's warehouse; an act that was prevented by the vendor's retention of the property in his actual custody. Said retention was held to excuse actual performance, and the property passed. In *Austen v. Craven*, 4 Taunt., 643, the sugar which was the subject of the contract, required to be weighed in order to ascertain the quantity. So in *Burk v. Davis*, 2 M. & Selw., 397, the quantity of flax to be delivered was to be ascertained by the wharfinger's weighing it (the mats being of unequal quantities, so that a fraction of a mat might be required), and an allowance for the tare and draft was to be made by the weight. In *Gregory v. Furnell*, 2 Camp., 240, there was a sale of two hundred and eighty-nine bales of goat-skins, five dozen in each bale. It appeared that, *by the usage of trade*, it was the duty of the seller of goat-skins by bales in this manner, to count them over, that it may be seen whether each bale contains the number specified in the contract. Before they were so counted the skins were destroyed by fire at the wharf, where they lay at the time of the sale. It was held by Lord Ellenborough that, as the enumeration of the skins was necessary to ascertain the price, which was an act for the benefit of the seller, and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. In *White v. Wilks*, 5 Taunt., 176, there was a sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil in divers cisterns, in divers places. Here the oil had to be weighed and separated.

Whitehouse v. Frost, 12 East, 614, was also a case of oil, and bears a closer analogy to the case under consideration than any that I have found. There, A, having forty tons of oil secured in the same cistern, sold ten tons to B, and received the price. B sold the same to C, and took his acceptance of the price at four months, and gave him a written order for delivery on A, who wrote and signed his acceptance on said order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A's cistern. *Held*, that this was a complete delivery in law of the ten tons by B to C, nothing remaining to be done on the part of the seller, though as between him and A, it remained to be measured off; and therefore the seller could not, on the bankruptcy of the buyer, before his acceptance became due, countermand the measuring off and delivery in fact to the then buyer. This case was undoubtedly decided against the current of authority. It was questioned in *White v. Wilks*, *supra*, and *Austen v. Craven*, *supra*, and may now be considered as overruled. The oil was sold by the ton. It was necessary not only to set it apart, but to weigh it. It could be truly said that one ton was the exact counterpart of any other ton, for the reason stated in the note to *White v. Wilks*, that fluids are affected by a change of temperature; those portions which are most exposed to heat becoming lighter, while those portions not so exposed are correspondingly heavier.

It would be unprofitable to further follow up this line of cases. I have cited enough to show what pervades them all, that something remained to be done as between the vendor and vendee, to ascertain the quantity, quality or price. When nothing of the kind remains to be done, as was said in *Scott v. Wells*, 6 W. & S., 357, the ownership and risk pass by a contract of sale without actual delivery. To the same point is *Rugg v. Minet*, 11 East, 210. But it must be conceded that where something remains to be done by the vendor to separate the goods and to enable the purchaser to get the actual custody and possession, the right of property would not pass, and the latter could not maintain an action of trover and conversion upon a refusal to deliver. It is almost needless to say that there could be no bailment where there was neither title nor possession in the bailor. He could make no delivery, and delivery is the essence of a bailment.

It remains to be seen whether the principles of law above referred to are applicable to the facts of the case. We must not

make the mistake of applying technical rules of law to cases for which they were not intended, and to which they have no proper application. An examination of the facts of this case shows it to differ in many essential features from any of those cited, or any of the cognate cases. In the first place, it is to be observed that in all of them the property sold was part of a larger quantity belonging to the vendor, and in his possession, from which it had not been separated or distinguished. Such was not the case here. The oil which is the subject of this contention was not mixed with any other oil of the prosecutor. It required no separation from any other portion of his property. It was not even in his actual custody or possession. He had the constructive possession by virtue of his accepted orders. When, therefore, he delivered the orders to the defendants, there was nothing remaining for him to do to complete the transaction. He had done all in his power to render the delivery complete. The oil was in the pipes of the Pipe Line Company. For the sake of convenience it was poured in and mixed with the oil of other producers, and, by the usage of trade, each one was entitled to draw out, not the identical oil put in, but oil which is its precise equivalent. In the consideration of the questions involved in this case, we cannot close our eyes to the total revolution in the manner of doing business which has been brought about by the discovery of petroleum in this state. It has developed a new industry of vast importance. Methods for conducting it have been devised and put in operation which were wholly unknown when the cases I have cited were decided. Instead of oil being hauled a long distance from the well to a market or shipping station, and there stored in barrels or in tanks in a merchant's warerooms, it is now turned at once by the producer into the pipes of the Pipe Line Company, and thence conducted to the line of the railroad or canal for shipment, or may be held in said pipes, or the tanks connected therewith. Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the precise counterpart of every other barrel contained therein. It differs neither in quantity, quality nor price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe Line Company. And here, again, there is a marked distinction between this and any of the cases cited. It was distinctly proved upon the trial that the delivery of the certificates was a delivery of the oil. It

was the usage of the trade, known to all these parties. It was, consequently, a part of their contract: *Zagury v. Fennell*, and *Scott v. Wells*, *supra*. The defendants recognized this usage by their receipt. For all the purposes of trade and commerce the delivery of the accepted orders was a delivery of the oil. This is a matter of fact, established by the evidence and admitted by the demurrer. Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts that the property passes; that the orders draw to them the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. None of the reasons which required a separation of the oil in the cases cited, exists here. It is mixed for the convenience of those dealing with the Pipe Line Company. It is separated by the latter when the holder of the order requires it. By the usage of the trade, he accepts the oil as it is drawn from the lines, and receives the precise equivalent in quantity, quality and value. It would seriously embarrass this large and valuable industry were we to hold that in such transactions the delivery of the orders was not a delivery of the oil. How can these defendants allege, with reason, that as to them there was no delivery, when, in point of fact, they drew the oil out of the pipes and applied it to the payment of their debts? That such was the fact, clearly appears from the evidence. If it had not been drawn out, it would have been in the pipes still, to meet the demand of the prosecutor. Even if the delivery of the orders was not a complete delivery of the oil at the time, such delivery became complete when the defendants drew it out, or enabled others to draw it out by a transfer of the orders. It would render the law contemptible in the eyes of business men, were it to say that there was no delivery of this oil, when, as a matter of fact, there was a delivery for all the purposes of trade and commerce; such a delivery as enabled the defendants to sell it, and apply the proceeds to the payments of their debts.

The principle contended for by the plaintiff in error rests upon the merest technicality. The tendency of modern legislation, as well as judicial decision, is to do away, as far as possible, with the subtle and refined distinctions of the common law, when they interfere with substantial justice. As was observed, in *Hunter v. Commonwealth*, 29 P. F. Smith, 503, "the revised criminal code and the criminal procedure act, have brushed away many of these

unseemly niceties." In each of the sections of the code hereinafter cited, artificial rules have given place to the advancing spirit of practical common sense in our legislation, and defects in the common law, long seen and acknowledged, have been supplied. As evidence of the legislative intent to regard substance rather than mere form, it may not be inappropriate to refer to the 124th section of the act of 1860, defining the words "trustee" and "property," as used in said act. It is there said that "the word 'property' shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating or evidencing the right or title to recover or receive any money or goods, and shall also include not only such property as may have been the original subject of a trust, but any property in which the same may have been converted, and the proceeds thereof, respectively, or any thing acquired by such proceeds." This language is very comprehensive, and evidently means that an offender shall not shelter himself behind technical rules, based upon a change of the character of the property from one species to another. We do not propose to give any construction to the code not warranted by its terms. But to apply a technical rule of law to a case that is not within its reason or spirit, would be almost as objectionable.

If there was a delivery of the oil, of which we have no doubt, it follows, necessarily, that there was a bailment. This brings us to the further question, whether the defendants fraudulently converted it to their own use. This point is free from difficulty. It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is *prima facie* evidence of the fraud. Larceny, at common law, involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion. The 107th, 108th, 109th, 113th, 114th, 115th and 116th sections of the act of 31st of March, 1860, were evidently intended to punish as crimes certain acts which, at common law, were mere breaches of trust. Hence, fraudulent conversions of property by bailees, trustees, clerks, servants, bankers, brokers, attorneys, officers of banks, and other corporations, are made criminal offenses by the sections referred to. It is not required by the 108th section, that the conversion by a bailee shall be with the *intent to defraud*. The omission of these words is significant; the more so, from the fact that

they are used in the 113th section relating to trustees, and the 104th section relating to bankers, brokers, attorneys, merchants and agents. In the case of a bailment, therefore, so far as the intent to defraud may be regarded as of the essence of the crime, it must be presumed from the unlawful conversion. If I deposit my pocket-book for safe keeping over night with my landlord, and he opens it and converts the contents to his own use, he is a thief both in law and morals. Nor does it matter that he has parted with it to pay his debt under the stress of an execution, with the intention of restoring it to me ultimately. Such a transaction would be transgressive of the 108th section of the act of 1860, and the conversion would be evidence of the fraud. But it is said that the defendants were bankers in oil, and that the case resembles that of an ordinary banker who receives moneys upon deposit. It is difficult to see the analogy. By the law and the usage of banking, the depositor who makes a general deposit of his money becomes a mere creditor of the banker. The money deposited becomes the property of the banker. He has a right to use it in his legitimate business. He may loan it out to his customers upon such security, and upon such terms, as are usual with bankers. No such state of facts exists here. The defendants acquired no property in, nor right to use the prosecutor's oil. It was deposited with them for storage and safe keeping only, for which they were to be paid a compensation agreed upon. What right had they to sell it to pay their debts, or for any other purpose? That they became embarrassed in their circumstances affords them no justification. They had no right to lay their hands upon the property of the prosecutor confided to them for safe keeping, in order to relieve themselves. Upon a careful consideration of the whole case, we are of opinion that the learned judge of the court below was right in adjudging that the defendants were guilty of larceny as bailees. The fact that the indictment included other counts which were defective, is not material. One good count is sufficient to sustain the sentence: *Commonwealth v. McKisson*, 8 S. and R., 420; *Hazen v. Commonwealth*, 11 Harris, 355.

The judgment of the court of quarter sessions is affirmed. And it is further ordered that Peter Hutchinson and W. S. Batchelder, the plaintiffs in error, be remanded to the custody of the keeper of the Allegheny county work-house, there to be confined according to law and the sentence of the court below,

for the residue of the term to which they were respectively sentenced, and which has not expired, on the 23d day of February, 1876, when the writs of error and *certiorari* in this case were lodged in the office of the clerk of the court of quarter sessions, and that the record be remitted to said court with instructions to carry this order into effect.

MERCER, J., dissented.

SMITH v. STATE.

(58 Ind., 340.)

LARCENY: *Recent possession of stolen property — Erroneous charge.*

The presumption or inference of guilt arising from the exclusive possession of stolen property, recently after the larceny, is purely a question of fact for the jury, and it is error to charge that, from such recent possession, if not satisfactorily explained or accounted for by the defendant, the law presumes the guilt of the defendant.

See note to *State v. Cassidy*, 1 Am. Cr. Rep., 567, where all the American cases are collected.

NIBLACK, J. The appellant, Edward Smith, was jointly indicted in the court below, with one John W. Sterne.

The indictment was in two counts: The first for burglary, and the second for grand larceny.

The first count charged that the defendants, Smith and Sterne, on the eighth day of April, 1877, in the night time, feloniously and burglariously entered the store-house of one Theophilus Wright, with intent to steal, take and carry away the goods and chattels of him, the said Wright.

The second count charged the stealing, at the same time and place, of certain articles of the personal property of the said Wright, of the aggregate value of near twenty dollars, amongst which were two pocket-knives of the value of one dollar each.

Smith, on a separate trial, was found guilty of burglary, as charged in the first count, and, over a motion for a new trial, was sentenced to imprisonment in the state prison for three years.

On the trial Sterne testified as a witness for the state, and, amongst other things, stated that he and Smith, with two other persons assisting them, entered the store-house of the said Wright, on the night charged in the indictment, being a Sunday

night, and carried away the personal property enumerated in the second count of the indictment; that he took one of the pocket-knives, and that Smith took the other, which was a white-handled knife.

Wright testified that on Tuesday afternoon, after he lost the goods, Smith took him to one side and intimated that he, Smith, knew where the goods were secreted, speaking, at the same time, of Sterne as the person who had the custody of them.

W. H. Evans testified that five or six days after the burglary, Smith exhibited to him a white-handled pocket-knife, which he, Smith, said had come from Wright's store, and which he claimed to have obtained from one of the parties implicated in the burglary; that Smith claimed that he exhibited this knife to show that he had found out and knew all about the burglary, because of a previous promise to Evans to try and find out about it.

Thomas J. Statt, who was present when the knife was exhibited, substantially corroborated Evans.

There was also evidence tending to show that, in the mean time, Smith claimed to other persons to be in communication with, or to have some knowledge of, the persons who committed the burglary, and that he was seen, the Sunday following the burglary, with Sterne, at the barn where a portion of the goods were concealed.

Two witnesses testified to having played cards all night with Smith, at a place some distance away from the scene of the burglary, and to other circumstances tending to establish an *alibi* on the part of Smith. Another witness testified to some admissions of Sterne while in jail, conflicting with his statements while on the witness stand, implicating Smith with the burglary.

Four or five witnesses also testified to the bad character of Sterne for truth.

At the proper time the court gave to the jury several instructions in writing. In instruction known as number four, the court, in substance, said that it is charged that the defendant broke and entered the store-house, with the felonious intent to steal, take and carry away the goods and chattels of Theophilus Wright. If you find that the defendant broke and entered the store-house, and are satisfied from the evidence, beyond a reasonable doubt, that the defendant did feloniously steal, take and carry away the personal goods of said Wright from said store-house, at the time the same was broken and entered, then the

jury would have the right to presume that it was his intention to steal such goods when he broke and entered the store-house."

By instruction known as number seven, the court further said to the jury: "If you should believe it to be true that the goods mentioned, or some portion of them, were stolen from Theophilus Wright, about the time charged in the indictment, and that, shortly after that time they, or some portion of them, were found in the exclusive possession of the defendant, such possession imposes upon the defendant the duty and burden of explaining his possession; and if he has failed to satisfactorily account as to how he came by the stolen property, or has given a false account of how he came into possession of such stolen property, the law presumes that the defendant stole such property, and this presumption may be strong enough to justify you in finding the defendant guilty of larceny."

Although the appellant was convicted of the burglary, and not of the larceny charged in the indictment, yet the course of the trial, including the instructions given by the court, made the question, as to whether the defendant had been guilty of larceny in connection with the burglary, a material one.

The appellant has devoted the greater portion of his brief to an argument to show that the court erred in giving instruction number seven, as above quoted. While the doctrine of this instruction may seem to be in substantial accord with some of the authorities which have fallen under our observation, we are of the opinion that it laid down a harsher rule than can be supported by the weight of modern authority.

In 3 Greenleaf Evidence, sec. 31, it is said: "We have heretofore adverted to the possession of the instruments, or of the fruits of a crime, as affording ground to presume the guilt of the possessor; but, on this subject, no certain rule can be laid down of universal application, the presumption being not conclusive, but disputable, and, therefore, to be dealt with by the jury alone, as a mere inference of fact. Its force and value will depend on several considerations. In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight, for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt. * * * It will be necessary, therefore, for the prosecutor to add the proof of other

circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction:" 2 Russ. Crimes, p. 337; *Curtis v. The State*, 6 Cold., 9; *The State v. Brady*, 27 Iowa, 126; *The State v. Creson*, 38 Mo., 372; *The State v. Merrick*, 19 Maine, 398; *The State v. Floyd*, 15 Mo., 349; *Smattery v. The State*, 46 Ind., 447; *Turberville v. The State*, 42 Ind., 490. In a prosecution for larceny, the fact that the stolen property is found upon the person of the defendant can always be given in evidence against him, but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case: *Engleman v. The State*, 2 Ind., 91. In the case of *The State v. Hodge*, 50 N. H., 510, a leading and well considered case, the Supreme Court of New Hampshire decided that the presumption thus raised was one of fact, and not of law; that there is no legal rule on the subject; that much depends on the nature of the property stolen, and the circumstances of each particular case; that "it is a presumption established by no legal rule, ascertained by no legal test, defined by no legal terms, measured by no legal standard, bounded by no legal limits. It has none of the characteristics of law. Whether it be found by the judge or the jury, the judge and the jury must be equally unconscious of finding in it any semblance of a legal principle, however much good sense may appear in the result arrived at. Being a presumption of fact, it should, according to our practice, be drawn by the jury, and not by the court." We regard this case as well supported by authority, and we feel it our duty to apply the doctrines enunciated by it to the case at the bar.

We think the court erred in saying to the jury, as it did in substance, that, in the absence of a satisfactory explanation of the possession of the stolen property, the law presumes that the defendant had stolen it—such a presumption being an inference of fact merely, and not amounting to a rule of law.

Evidence in explanation of such possession may fall short of a satisfactory explanation, and yet be sufficient to acquit. If it creates a reasonable doubt, it practically rebuts the presumption of guilt: *Clackner v. The State*, 33 Ind., 412; *Way v. The State*, 35 Ind., 409.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for the return of the prisoner.

STATE V. BALLINGALL.

(42 Iowa, 87.)

LETTING FOR ILLEGAL PURPOSES: *Permitting*

Under a statute which punishes one who *authorizes or permits* premises to be used for the sale of intoxicating liquors, the lessor is not guilty if he rented the premises for a lawful purpose, not knowing that they were to be used for the unlawful sale of intoxicating liquors, although he afterwards knew that they were so used, and took no steps to prevent their continued use for that purpose.

MILLER, CH. J. The evidence showed that the defendant was the owner of the building known as the "Ballingall House," in the city of Ottumwa, which was built and used as a hotel. In this building certain rooms were finished off with bar, shelves, etc., and were used for saloon and billiard rooms. The evidence tended to show that the saloon had been leased by the defendant to one Fraunburg, who sold intoxicating liquors therein on his own account, and not as clerk, servant or agent of defendant. The defendant erected the hotel and had these rooms fitted up in the manner they were when Fraunburg opened his saloon. There was evidence tending to show that the defendant knew to what purpose the rooms were to be put before he leased them to Fraunburg, and that afterwards he knew how they were being used, and made no objection thereto, nor attempted to prevent the unlawful sale of intoxicating liquors therein. The instructions given and refused are numerous, but they present only the question whether, under this indictment, if the defendant leased the rooms where the liquors were sold contrary to law by Fraunburg, for a lawful purpose, or not knowing that they were to be used for the unlawful sale of intoxicating liquors, but afterwards became acquainted with the fact that they were being so used, and took no steps to stop or prevent the continuance of the unlawful traffic therein, either by word or action, he may be lawfully convicted. The court instructed to the effect that he could be, while those asked by the defendant and refused were to the effect that he could not.

The section of the statute (Revision, sec. 1564, Code, sec. 1543) under which this indictment is drawn, provides that "proof of the manufacture, sale or keeping, with intent to sell, of any

intoxicating liquor in violation of the provisions of this chapter. in or upon the premises described, *by the party accused or by any other under the authority or by the permission of the party accused*, shall be presumptive evidence of the offense provided for in this section." Under this provision of the statute, there can be no doubt that, if the owner of a house lease the same to another for the purpose of the unlawful sale of intoxicating liquor therein, the lessor may be indicted and convicted. It is claimed, however, that where the building has been leased for a lawful purpose, and it is afterwards used for the unlawful sale of intoxicating liquors, to the knowledge of the owner, he cannot be legally convicted, unless he does some affirmative act signifying his assent thereto or his permission for the continuance of the unlawful traffic. In *The State v. Abrahams*, 6 Iowa, 117, in which the defendant was indicted under section 2712, of the Code of 1851, which enacts that if any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly *permit* such lessee to use the same for such purpose, he shall be punished," etc., it was held, the defendant being charged with knowingly permitting his house to be used for the purpose of prostitution and lewdness, it must be shown that he did some act, or made some declaration, affirmatively assenting to the property being so used, after he had knowledge that it was being used for such unlawful purpose; that mere inactivity on the defendant's part, or a failure on his part to take some steps to prevent the illegal use, is not permitting it in the sense contemplated by the statute. The doctrine there announced covers this case. The defendant here cannot be legally convicted under this indictment, unless it is shown that, after he became aware of the illegal use of his house by the lessee, he did some act, or made some declaration, affirmatively assenting thereto. It was error, therefore, to give the instructions referred to on this point, and to refuse those asked by the defendant.

The judgment must, therefore, be reversed.

NOTE.—To the same effect is *State v. Stafford*, 67 Me., 125.

CROFTON V. STATE.

(25 Ohio St., 249.)

LETTING FOR ILLEGAL PURPOSES: *Knowingly permitting—Indictment.*

Under a statute punishing the owner of premises for knowingly permitting them to be used or occupied for the purpose of prostitution, and conferring on the lessor power to avoid the lease and re-enter where the lessee does use the premises for such purpose, proof that the lessee does use the premises for such purpose, and that the lessor, having knowledge of the fact, takes no steps to avoid the lease, will not justify his conviction under the statute, in a case where the evidence shows that the lessor originally leased the premises without any knowledge or intent that they would be unlawfully used by the lessee.

Under such a statute, it is not necessary that the indictment should specifically aver that the premises were, in fact, used for purposes of prostitution.

McILVAINE, C. J. There was no error in overruling the demurrer. The only objection made to the sufficiency of the indictment is, that it does not contain an averment that the house was, in fact, used and occupied for the purpose of prostitution. It is not claimed that, under this statute, an averment that prostitution was in fact practiced in the house, is essential. The point made is that the indictment should show that the house was, in fact, used for that purpose. The distinction between such averments and certainty, to a certain intent in particular, and certainty to a certain intent in general—the latter degree of certainty being all that is required in criminal pleadings, and we think it is found in this indictment. There is no substantial difference between an averment, that A permitted B to use and occupy a house for a certain purpose, and the averment that A permitted the house to be used and occupied by B for such purpose. The indictment in this case describes the offense substantially as it is described in the statute, with the further averment that the accused, unlawfully and knowingly, permitted Mitchell to keep in said house certain females for the purpose of prostitution, with intent that such females should therein have illicit carnal intercourse with men.

The unlawful use of the house by Mitchell, with the knowledge and permission of the accused, is sufficiently averred in the indictment.

Upon the whole record, however, we think the defendant below was improperly convicted.

This statute seeks to prevent the evil of prostitution by suppressing houses of ill-fame. All houses or buildings used or occupied for such purposes are declared to be public nuisances. It also punishes the owner or person having the control of such places, in each of the following cases :

1. For knowingly leasing or subletting the same for such purpose. 2. For knowingly permitting the same to be used or occupied for such purpose. 3. For using or occupying them for that purpose.

The defendant was indicted for the second offense above named. The testimony showed that he was the owner of the house, and had leased it to Mitchell for a term without any knowledge or intent that it would be unlawfully used by the lessee. By his contract, he parted with all control over it for the term.

It is true, the lessee, during the term, used it in violation of the statute, but there is no pretense that the defendant assented, in fact, to such use. Indeed, the proof is to the contrary, except only in the fact, that he refused to avoid the lease and re-enter, upon being informed that the property was being used in violation of the statute.

The whole case, therefore resolves itself into this single question : Was such refusal to avoid the lease and re-enter into the possession, an indictable offense under the statute ?

The court below told the jury that "such refusal would amount to an acquiescence in the keeping such a house" (that is, as we understand it, sufficient proof of the offense charged), unless the defendant took other steps "to induce Mrs. Mitchell either to move or abstain from such use of the premises."

The qualification annexed to this instruction is of no significance. The defendant was under no legal obligation to induce Mitchell to remove, or to abstain from the illegal use of the premises. That it was his moral duty to do so, may be admitted, but the omission on his part to take steps to that end, was no offense under the statute. Section 2 of the act confers on the lessor of property the power to avoid his contract of lease for cause named ; but it does not make the omission to exercise the power an indictable offense. Nor is the offense, as declared by the first section, where the owner or person having the control of

property, knowingly permits it to be used for the purpose of prostitution, sustained simply by proving that the lessor refused to avoid a lease innocently made, on the ground named in the second section.

Judgment reversed.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

STATE V. PEARSALL.

(43 Iowa, 630.)

HOUSE OF ILL-FAME: *Evidence.*

In order to render the defendant guilty of keeping a house of ill-fame, it must appear that he has some interest in it as such, or that he participates, or is authorized to participate in some way in its management. Proof that he is the owner and lessor of the house, and that he is frequently there, and stays there Sundays, is not sufficient.

ADAMS, J. The court instructed the jury as follows: "Proof that the defendant acted as keeper of the house, or so held himself out to the world, is sufficient. You are to take into consideration all the circumstances. In the absence of proof to the contrary, the persons in possession of the premises, and occupying the same, are presumed to have control of them, and a continual use of the same, for a considerable time, as a house of prostitution, would justify the jury in finding that the defendant, if living in the house, was consenting to, and a party to the use of it, for that purpose, although the evidence did not show he actually received any money on account of such use."

To the giving of this instruction the defendant excepted, and now assigns the same as error.

The evidence shows that the house in question was a house of ill-fame, owned by the defendant Pearsall. But it was rented and kept by one Mrs. Rufe. Whether it was kept also by the defendant is the question in the case. The instruction is objected to upon the ground that there was no evidence to justify it.

One of the witnesses says: "Pearsall has made his home there; have seen him carrying provisions there." Another witness, who is an inmate of the house, says: "Mr. Pearsall goes to

Mrs. Rufe's frequently; he stays all night there once in a while; he generally eats there on Sundays; I don't know but he has come there on Saturday and stayed until Monday morning; he sometimes comes up there and eats dinner; sometimes he goes in the pantry and eats." Another witness says: "I saw Pearsall building the house; I have seen Pearsall around there frequently; I think I saw him once fixing up the fence, and have seen him lots of times doing nothing."

Taking the evidence altogether, we think it shows that the house is not Pearsall's usual home, but that he is often there looking after his premises, and may be said to live there on Sundays. We think the evidence would justify the jury in so believing. Assuming, then, that the defendant owns the house and lives in it a part of the time, would that constitute him joint keeper of the house with Mrs. Rufe, there being no evidence that he was not there as a boarder? We are of the opinion that it would not. The most which the evidence establishes is that defendant is lessor of the house, and knowingly permits it to be used as a house of ill-fame. This constitutes a distinct offense, and must not be confounded with that of which the defendant is convicted. He who keeps a house of ill-fame has some interest in it as such, or participates, or is authorized to participate, in some way in its management. In this there is no evidence of either. His rent was neither greater nor less, according to the patronage which the house received, nor did he furnish or discharge inmates, or have authority to furnish or discharge them, or to control the house in any respect, so far as the record shows.

Reversed.

CLAY v. THE PEOPLE.

(86 Ill., 147.)

LIBEL: *Indictment—Objection not made in trial court—Liability of one procuring a libel to be published*

An indictment for libel which charges that the libel is "as follows," and then sets it forth *verbatim*, with sufficient innuendoes, alleges the libel with sufficient certainty.

An objection made in the Supreme Court that the libel proven is variant from that set forth in the indictment, will not be considered where no such objection is made in the court below.

One who makes to a newspaper writer the statements of fact on which a libel is based, and, after the article is in type, hears the proofs read and affirms its truth and assents to its publication, is as guilty of libel as though he had written and published the article himself.

Writ of error to the circuit court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding.

This was an indictment against Cassius M. Clay for a libel. The indictment, omitting formal parts, was as follows: "That Cassius M. Clay * * unlawfully and maliciously contriving and intending to vilify and defame one Amanda Masters and Etta Masters, and to bring them into public scandal and disgrace, and to injure and aggrieve them, the said Amanda Masters and Etta Masters, unlawfully, maliciously and willfully did compose and publish, or cause and procure to be composed and published, a certain false, scandalous, and malicious and defamatory libel of and concerning them, the said Amanda Masters and Etta Masters, and caused and procured the said false and scandalous, malicious and defamatory libel to be printed in a certain newspaper, called the *Streator Pioneer*, in the town of Streator, in La Salle county, state aforesaid, with intent to circulate and publish, and afterwards did circulate and publish, the said false, malicious and defamatory libel of and concerning the said Amanda Masters and Etta Masters, so printed as aforesaid in said county of Livingston, which false, scandalous, malicious and defamatory libel of and concerning the said Amanda Masters and Etta Masters, so printed, circulated and published in said county of Livingston, is as follows: 'Brutality. Two young women maltreat their mother. A matter which, for brutality, is nearly equal to anything which has taken place in this vicinity for some time. occurred about seven miles southeast of this village (meaning the village of Streator) recently. The actors in this drama of real life are named Masters (meaning the said Amanda Masters and Etta Masters), and we presume are known to some of our citizens. The father (meaning the father of the said Amanda Masters and Etta Masters) was called away from home on business, leaving with his wife (meaning the mother of the said Amanda Masters and Etta Masters) one hundred dollars to procure the necessaries of life during his absence. They (meaning the father and the mother of the said Amanda Masters and Etta Masters) have two daughters, Amanda and Etta Masters (meaning the said Amanda Masters and Etta Masters) aged eighteen and twenty, who now

saw an opportunity to brace up and put on a little style, and in order to further their (meaning the said Amanda Masters and Etta Masters) scheme, demanded the money of their mother (meaning the mother of said Amanda Masters and Etta Masters), who refused to give it (meaning the money) up, and the two daughters (meaning the said Amanda and Etta Masters,) attacked (meaning the said Amanda Masters and Etta Masters assaulted their mother with intent to rob her) their aged mother (meaning the mother of the said Amanda Masters and Etta Masters), beating her (meaning the said Amanda Masters and Etta Masters assaulted their mother with intent to rob her), and at last knocked her down behind the stove (meaning thereby the said Amanda Masters and Etta Masters knocked down their mother with intent to rob her), where she lay insensible for some time. At last Mrs. Masters came to herself, when the recollection of the brutal treatment she had received at the hands of those who, above all others, should have loved and cherished her and done their utmost to render her last days pleasant and joyous, smoothing out the wrinkles of care and sorrow, nearly drove her wild (meaning thereby that the brutal treatment of the said Amanda Masters and Etta Masters nearly drove their mother crazy), and she (meaning the mother of the said Amanda Masters and Etta Masters) proceeded to the barn to hang herself. The daughters (meaning the said Amanda Masters and Etta Masters) were entirely indifferent (meaning to charge the said Amanda Masters and Etta Masters with being indifferent and not caring if their said mother committed the act of suicide). But an adopted boy, who is living with the family, ran and informed the son of Mrs. Masters, who arrived just in time to prevent his mother from carrying her intention into execution (meaning that a brother of the said Amanda Masters and Etta Masters prevented their mother from committing suicide). After he had departed, the daughters (meaning the said Amanda Masters and Etta Masters) made another attempt to assault their (meaning the said Amanda and Etta Masters) mother, but were prevented by an older married sister (meaning a sister of the said Amanda and Etta Masters), who informed them (meaning the said Amanda Masters and Etta Masters) that she would protect her mother, and thus the matter rests. If any of our Streator old bachelors want a wife who will make it lively for them, let them make a trip out to Masters' (meaning the home of the said

Amanda Masters and Etta Masters), and secure one of these amiable creatures (meaning either of the said Amanda Masters or Etta Masters), and in about a year he will fetch up in the insane asylum with less hair on his head than is worn by the editor of the *Pioneer*.' Contrary," etc.

Mr. H. N. Ryon, for the plaintiff in error.

Mr. J. K. Eidsall, Attorney-General, for the people.

WALKER, J. The plaintiff in error was indicted and convicted of libel in the La Salle circuit court. He was fined \$300 and costs, and it was ordered that he stand committed until the same should be paid. He brings the record to this court, and asks a reversal on several grounds.

It is first urged that the libel is not set out with sufficient certainty, and the indictment should, for that reason, have been quashed on the motion interposed for that purpose. This libel is introduced into the indictment by the words, "as follows." This is sufficiently certain—as much so as had the language, "in the words and figures as follows," been employed. We regard the indictment, under our statute, which only requires it to be so plainly stated that the offense charged may be easily understood by the jury, as good in substance and form. This indictment answers all of these requirements of the statute, and the court did not err in overruling the motion to quash.

It is claimed that the libel read in evidence was variant from that set out in the indictment. We have turned to the transcript, and fail to find that any objection was made to the introduction of the article in evidence because of a variance, or for any other reason. And even if there are variances, the objection should have been made when it was offered, and, on being overruled an exception should have been preserved. But, failing to do so, it can not be raised, for the first time, in this court.

It is also insisted that plaintiff in error did not write or publish the article, and is, therefore, wrongfully convicted. It is a familiar maxim, that what a person does by another he does by himself; and, we think, it applies in its full force in this case. He voluntarily gave the main statements in the article to one of the persons connected with the publication of the paper, who, after writing part of an article embodying the facts thus given him, communicated them to the editor of the paper, who thereupon wrote and published the article read in evidence. After it

was in type, the article was read to plaintiff in error from the proof sheet. He suggested a correction as to the course the family referred to resided from Streater, said it was a little rough, but it was true, and let it go. That he, in substance, so said to Gale and Babcock, we think so abundantly proved as to require the jury so to find. He knew it was in type for the purpose of being published in the paper. He must have known it was read to him to get his indorsement of the truth of the statements it contained. He made no protest or objection to its publication, but, on the contrary, he said, "let it go," and it was published as he thus directed. We may reasonably infer that had he previously, or even at that time, directed the editor not to publish the article, as it might not be true, and, if not, that it would inflict a grievous wrong on innocent people, it would never have appeared. On the contrary, he volunteered the statements on which the article is based; hears it read after it is written and in type; hearing it read, he says, "let it go," and it was published as thus directed.

Although the editor may be equally liable, that does not exonerate plaintiff in error. He took an active part in its production and publication, and is, essentially, one of its authors and publishers, and, as such, must be responsible for the injury he has inflicted on society by his reckless, if not wanton and malicious, conduct in this matter. It would have required but little effort to have learned whether the rumor, as he calls it, was true; but he does not pretend to have made any effort. He himself admitted that it was rough, but that did not restrain his action. We have no doubt of the sufficiency of the evidence to sustain the verdict, and, perceiving no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

RICKART v. PEOPLE.

(79 Ill., 85.)

LIQUOR SELLING: *Evasion of liquor law — Jurisdiction of justices.*

Justices of the peace have jurisdiction of actions to recover the penalty for an unlawful sale of liquor, imposed by sec. 13 of chap. 43, R. S. 1874.

The provisions of the liquor law, prohibiting the sale of liquor without a license, cannot be evaded by a saloon keeper's customers organizing a

VOL. II.—25

sham association, pretending to buy him out and electing him treasurer, and then letting him carry on his business with the members precisely as he did before, with the single exception that the so-called members, instead of paying cash for their drinks, purchase tickets at a dollar a piece, which are good for a dollar's worth of drinks, which tickets are punched for each drink had on them until the ticket is exhausted. The saloon-keeper, not having a license, is properly convicted under the law.

SCOTT, CH. J. This action was commenced before a justice of the peace, on complaint under oath, to recover the fine imposed for a violation of the second section of the act entitled "Dram Shops," to provide for licensing of and against the evils arising from the sale of intoxicating liquors. That section makes it unlawful for any person not having a license to keep a dram shop, either by himself or another, to sell intoxicating liquors of any kind in a less quantity than one gallon, or in any quantity, to be drank on the premises, or in any adjacent room or place, and subjects the offender to a fine and imprisonment: R. S. 1874, chap. 43, sec. 2.

The twelfth section provides that any fine or imprisonment mentioned in the act may be enforced by indictment in any court of record having criminal jurisdiction, or the fine may be sued for and recovered before any justice of the peace of the proper county, in the name of the people of the state of Illinois. Under this clause of the statute the justice of the peace had jurisdiction to try the cause, and we are not aware of any provision of the constitution it contravenes: *McCutcheon v. The People*, 69 Ill., 601.

Of the questions raised only one need be considered, and that has relation to the guilt of the defendant. The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions, unlawful selling. That defendant resorted to a shift or device to evade the provisions of the law against selling intoxicating liquors, we entertain not the slightest doubt. There is no pretense defendant had a license to sell intoxicating liquors, and hence it follows, if he made any sales in a less quantity than one gallon, or in any quantity, to be drank on the premises, or in any adjacent room or place, such sales must have been unlawful.

Prior to the first day of July, 1874, defendant had a bar in a room in the "Platt House," where he kept for sale the usual stock of liquors, having a license to keep a dram shop. About that date there was organized what is called the "Wheaton

Copartnership Company No. One." The object of the company, as set forth in the articles of association, was "to promote temperance, friendship and good feeling in the community at large. Any white male citizen, above the age of twenty-one years, of steady, industrious habits, sound mind and memory, and good moral character," could become a member of the association on complying with certain conditions.

The association, or company, had as officers a president, vice-president, secretary and treasurer, whose duties were all defined. The capital stock of the company was to be \$300, and was to be invested in business, but what that business was, or its character, is not declared, either in the articles of association or in the by-laws. One of the by-laws provides, "no partner shall give any goods of the company to a minor, unless such minor is a member of his family;" and, another, that "no partner shall sell any of the firm goods to any person or persons whatever, either directly or indirectly." At the time this prosecution was commenced, the proof shows the association consisted of about 150 members. Notwithstanding, it is declared the object of the association is the promotion of "temperance, friendship and good feeling in the community at large," among its first acts, the company rented the room defendant had formerly occupied, purchased of him the remaining stock of liquors he had on hand, and set up and opened a saloon, without having first obtained a license to keep a dram shop, and all under the management of defendant, with the specious title of "treasurer."

Bender, the secretary of the alleged company, was examined as a witness on the part of the prosecution, and gave a description of the place and manner of doing business, as follows: "There were two front rooms in the Platt House, and that the west one was used for an office, store-room and one thing and another; that there was a door between the two rooms, and a front door opening south from the west room, and that from the east room there was also a door opening to the south on the street, which was closed the latter part of June last, and had since that time remained closed; that a club, or association, known as 'The Wheaton Copartnership No. One,' had had control of the east room from the 1st day of July, 1874; that this club had possession of this east room, and that the defendant stayed there most of the time, and took charge of it and kept it in order for the club; that in this room there was a bar, the same

which was there and kept by the defendant before that time; that there was kept there lager beer, two kinds of whisky, bitters, wine, a beer-cooler and glasses, with a lunch, but no brandy; that the defendant had absolute control of the east room during the night time, and that from the 1st day of July, 1874, to the 4th day of October, 1874, this beer and other liquors were, from time to time, delivered in glasses to different persons in this room; that the liquors were often replenished by defendant; that moneys received by defendant were by him put in his pocket, that the cost, or price, of one glass of beer was five cents, and five cents for the poorer quality of whisky, and ten cents for the better quality, ten cents a glass for wine, one kind of cigars for five cents, another kind ten cents each; that the defendant had nailed up on the bar a United States government license, before the 1st day of July, 1874, and that it had remained there ever since; that the defendant, and also his father, drank liquor there without paying for it; that liquor was delivered to boys under the age of twenty-one years, but persons living outside the county did not get liquors there."

Tickets were issued to persons, on becoming members of the association, entitled "Certificates of copartnership investment in the Wheaton Copartnership Company No. One," signed by the president and secretary, with figures printed thereon from 1 to 20, both numbers inclusive. Such tickets cost one dollar. Whenever a member wanted anything at the bar, he presented his ticket, and it was punched, by cutting one number for a glass of beer, one for a poor grade of whisky, two for a better grade and two for a glass of wine, and if he took a cigar, the ticket was punched in the same manner, according to the price of the cigar selected, each number representing five cents.

Although the business had been carried on in this way from the 1st of July to October, no distribution of profits had been made among the alleged members, nor had the treasurer been called upon to render any account. The whole business was transacted by defendant. All purchases were made by him, he received all moneys for tickets, paid all bills, and if he kept any account with the association, the proof fails to show it. The proof is, "that moneys received by the defendant were by him put in his pocket," and no other account is given of the receipts. Any person, it appears, could become a member of the association simply by buying a ticket. The witness, whose testimony

we have before cited, says, "that he supposed a person might join the club, call for a glass of beer, get it, have his ticket punched, and then offer back his ticket and demand the balance of the money paid in by him, get it, and cease to be a member of the club." It is averred, however, nothing of the kind has ever occurred, but the witness states he had known an instance of a person, who was not a member, drinking beer that belonged to the club in the club-room. All this is plainly a device, on the part of defendant and those who desire to patronize his bar, to avoid the provisions of the law, and to enable him to sell intoxicating liquors at retail, as he had formerly done, without first obtaining a license to keep a dram-shop. The purpose and object is so transparent, that the subject need not be seriously discussed. The whole thing is a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law. The ticket arrangement was simply paying in advance and getting the liquors at convenient seasons, when desired. The proposition is absurd, that the ticket-holders really owned the liquors with which the bar was stocked. Each party bought tickets, to be used at the bar when he wanted anything, and for no other purpose. Should we adopt the theory of the defense, that the several ticket-holders, or parties constituting the association, in fact owned the liquors in the saloon, it would make no better case for defendant, and a vastly worse one for the parties associated with him. In that view, the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members, or partners, at retail, without a license to keep a dram-shop, than a mere stranger would have. Buying tickets, as we have seen, was simply buying twenty drinks and paying for them in advance. Each one paid for whatever he got, as he would have done had he bought of a licensed seller. It is preposterous to assume that a number of persons may, with impunity, associate themselves together as a firm or voluntary company, purchase a quantity of liquors and retail them out to the several members as they would to strangers. Such an enterprise is unlawful, and all concerned would be guilty of violating the statute. If such a device could be tolerated, it would render all legislation on this subject nugatory. But the alleged association is a mere fiction. It is nothing but a device, under the guise of a copartnership company, adopted to enable defendant to sell intoxicating liquors to whom-

soever might desire to buy at his counter, and to enable him to do so without taking out a license for that purpose, as the law requires.

The real object of the parties engaged in the business was purposely concealed in the articles of association. Had it been an honest enterprise, there would have been nothing to conceal. It was adopted under legal advice, and is obviously nothing but a shift, or device, to evade the provisions of the law, and whatever liquors were either given away or sold for tickets, under that arrangement, come within the definition of "unlawful selling." It was a question of fact whether the association was a mere shift, or device, to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached.

The evidence so fully and so clearly sustains the verdict, that we have not deemed it necessary to remark upon the instructions. Any other verdict than the one rendered would have been against the weight of the evidence.

The judgment must be affirmed.

Judgment affirmed.

NOTE.—For cases in which similar ingenious schemes were put in operation in an effort to evade the law, see *Marmont v. State*, 48 Ind., 21 (S. C., 1 Am. Cr. Rep., 447); *State v. Mercer*, 32 Iowa, 405; *Commonwealth v. Smith*, 102 Mass., 144. In the last named case, the verdict against the defendant was set aside, because the court assumed that the club was a mere device to evade the law, instead of leaving it to the jury to determine as a question of fact.

STATE V. STARR.

(67 Me., 242.)

LIQUOR SELLING: *What is malt liquor, a question of fact.*

Under the Maine statute, which provides that ale, porter, strong beer, lager beer, and all other malt liquors, shall be considered intoxicating liquors within the meaning of the act, what liquors are malt liquors within the meaning of the act, is a question of fact for the jury and not of law for the court.

LIBBEY, J. These cases are indictments, one for being a common seller of intoxicating liquors, the other for keeping a drinking-house and tipping-shop. The exceptions are the same in both cases, and therefore they are considered together.

To sustain the issue, the government introduced evidence tending to show the sale of an article called "Stanley's Hop Beer." This article, the government contended, was a malt liquor within the meaning of sec. 22, c. 27, of the Revised Statutes, which was denied by the respondent. The statute referred to declares that "ale, porter, strong beer, lager beer and all other malt liquors shall be considered intoxicating liquors within the meaning of this chapter, as well as all distilled spirits." All the requested instructions which are relied upon by the counsel for the respondent are based upon the ground that it was the duty of the court to instruct the jury, as a matter of law, what are the "malt liquors" intended by the statute, and embraced in, and prohibited by it. We think they were properly refused. The term malt liquor is a general term, embracing several kinds of liquor; what liquors are embraced in it, as well as the mode of their manufacture and the ingredients of which they are composed, is a question of fact for the jury, and not of law for the court. In every case in which the question is involved, it is competent for both parties to show by proper evidence, what a malt liquor is, how it is manufactured, and of what it is composed, and also to show whether the particular liquor in controversy is or is not a malt liquor, and the jury must determine the issue upon the evidence. The court might as well be required to instruct the jury, as matter of law, what liquors are embraced in the term ale, or distilled spirits. The question is the same in principle as that which would arise under the same section of the statute, if the liquor sold was one not therein specifically declared to be intoxicating, but claimed to be intoxicating by the government. In such case it is well settled in the state of Massachusetts, that what is an intoxicating liquor, and whether the liquor sold was intoxicating or not, are questions of fact to be determined by the jury upon the evidence in the case: *State v. Wall*, 34 Maine, 165; *Commonwealth v. Chappel*, 116 Mass., 7; *Commonwealth v. Bloss*, *Id.*, 56

Exceptions overruled.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH, and VIRGIN, JJ., concurred.

NOTE.—The following cases decide that, whether any particular liquor or beverage is intoxicating, is a question of fact and not of law: *State v. Biddle*, 54 N. H., 379 (S. C., 1 Am. Cr. Rep., 490); *Lathrop v. State*, 50 Ind., 555 (S. C., 1 Am. Cr. Rep., 490); *State v. Long*, 74 N. C., 121.

STATE V. HYNES.

(66 Me., 114.)

LIQUOR SELLING: *Evidence—Charge.*

On the trial of the respondent for being a common seller of intoxicating liquors, a charge "that the jury could infer the fact of sales from circumstances, and the situation of the respondent, if they were satisfied to do so," is not erroneous.

On such a trial where children have testified to going to the defendant's shop and purchasing liquor, it is proper to admit their mother to testify that they had been sent there for liquor, had been furnished with money and a bottle, and had gone out and returned with the liquor, although she did not herself know that they got it of the defendant.

APPLETON, C. J. The defendant was indicted as a common seller of intoxicating liquors, and found guilty.

The presiding justice instructed the jury: "That there must be proof of a plurality of actual sales, and sufficient of them to satisfy the jury of the offense alleged; but that the government were not required to prove a plurality of sales by witnesses who purchased liquor of the respondent, or by persons who have seen liquors sold by the respondent or by his clerks and agents; that the jury could infer the fact of sales from circumstances, and the situation of the respondent, if they were satisfied to do so."

Exception is taken to the latter clause of the instruction. But all crimes may be proved by circumstantial evidence. The situation of the respondent, his conduct, his acts, may become of the utmost importance in determining the question of his criminality. Circumstances and the situation of the accused may be of so criminative a character as not merely to justify, but imperatively to require a verdict of guilty of even the highest crimes known to the law. The common seller of intoxicating liquors has no peculiar grounds for exemption from the general principles of law adopted in the investigation of crime: *State v. O'Conner*, 49 Maine, 594.

The evidence shows that Mrs. Kely supplied her two children with a bottle and money to purchase liquor, and that they returned with it. The children sent on this errand testified that they received the money and purchased the liquor of the respondent. True, the children testified they received the money and returned with the liquor, but the government had an unquestion-

able right to strengthen their testimony as to these facts. The evidence of Mrs. Kelty of itself proved nothing, but in connection with the other testimony it was of importance. No other exceptions to the rulings of the presiding justice are relied upon.

Exceptions overruled.

WALTON, DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

ADAMS v. STATE.

(35 Ohio St., 584.)

LIQUOR SELLING: *Evidence — Reputation as to habit of becoming intoxicated — Cross-examination — Exception to whole charge.*

On a prosecution for selling liquor to a person in the habit of becoming intoxicated, where it has appeared that such person resides in the neighborhood of the respondent, and that he is in the habit of becoming intoxicated, the state has a right to give evidence of his general reputation in the neighborhood in that regard, for the purpose of proving knowledge of that habit on the part of the respondent.

The trial court has a discretion to allow the prosecution to elicit, on cross-examination of the respondent's witnesses, material evidence in support of the case in chief, even though such witnesses did not testify as to such matters in their direct examination, and the judgment will not be reversed because that has been done, unless it appears that there was such an abuse of discretion as to deprive the respondent of a fair trial.

Where the charge consists of several distinct propositions, some of which are correct, a general exception to the whole charge, and every part of it, will not be considered by the appellate court. The party excepting should, at the time, point out definitely the part of the charge excepted to, and state the grounds of his exception.

Rex, J. The questions presented for determination here arise upon exceptions taken :

1. To the ruling of the court permitting the state, on cross-examination of witnesses produced and examined by the plaintiff in error, to interrogate them as to the general reputation of the person to whom the sale of the intoxicating liquor is alleged to have been made, for habits of intoxication, in the neighborhood where the defendant lived, when no question had been asked in chief, by the plaintiff in error, in regard to his reputation in that behalf.

2. To the admission of evidence of the general reputation of

the person to whom the intoxicating liquor was sold, for habits of intoxication, in the neighborhood where the plaintiff in error resided, for the purpose of proving knowledge of that habit on his part.

3. To the instructions given by the court to the jury; and, 4. To the overruling of the motion to set aside the verdict and for a new trial.

The exceptions will be considered in the order named:

1. The rule contained in section 151 of the Code of Criminal Procedure, on the subject of the order of the production of evidence, although directory merely, should be observed in all criminal trials; but if the court permitted evidence in chief to be given on the part of the state, on cross-examination of the witnesses of the plaintiff in error, the judgment will not be reversed on that ground, unless it appears that there was such an abuse of discretion as to have deprived the plaintiff in error of a fair trial: *Evans v. The State*, 24 Ohio St., 458; *Rew v. Missouri*, 17 Wall., 532. It is plain that the discretion exercised in the present case was not of that character.

2. The court, in our opinion, did not err in the admission of the testimony excepted to. It appears, from the bill of exceptions, that evidence had been produced by the state showing that the person to whom the intoxicating liquor was sold was in the habit of getting intoxicated, and that he resided in the neighborhood of the plaintiff in error. Evidence of his reputation in that regard was, therefore, properly admissible, as a circumstance tending to prove knowledge of that habit on the part of the plaintiff in error; and that this was the sole and only purpose for which the testimony was admitted, is evident from the instructions given by the court to the jury on this subject.

3. The charge, which is set out in the bill of exceptions, consists of several propositions, some of which are in accordance with law, and undoubtedly correct, and others of doubtful correctness. The exception is a general one to the whole and every part of it. The argument, however, presents two points upon which it is claimed the court erred: 1. In its definition of the word intoxication; and, 2. In the instruction given as to what constitutes the habit of getting intoxicated. The exception being a general one, did not call the attention of the court to the points now claimed to be erroneous, nor did it suggest to his

mind what the counsel excepting would have him hold, nor wherein his charge was wrong.

It seems to be well settled, both upon principle and authority, that in excepting to the charge of a judge, the party excepting should, at the time, point out definitely the part of the charge excepted to, and state the grounds upon which he excepts; and it is equally well settled, that unless the exception directs the attention of the judge to the portion or proposition of the charge excepted to, and specifically and distinctly the grounds of the exception, a reviewing court is not bound to take any notice of the exception, nor to look beyond the grounds of the exception thus stated.

In *Bain v. Whitehaven & Furness Junction Railway*, 3 House of Lords Cases, 16, Lord Brougham held: "It is necessary that when a party excepts to the reception of evidence, or to the rejection of evidence, or to the direction of a judge given to the jury, whatever is the subject-matter of his exception, he must state the ground of his exception, otherwise he can not except. It is not enough for him to say: 'I except to the receiving of A's evidence;' or, 'I except to the rejection of A's evidence;' or, 'I except to the first passage in the direction given by the learned judge to the jury.' In all these cases the ground of the objection must be clearly stated, and, beyond the ground of the objection thus stated, the court is not bound to look."

In *Jones v. Osgood*, 2 Seld., 233, it was held: "A general exception 'to the whole charge of a court, and to each part of it,' when the charge contains more than a single proposition of law, and is not in all respects erroneous, presents no question for review on appeal."

These rules, it is said, have their foundation in a just regard to the fair administration of justice, which requires that when an error is supposed to have been committed there should be an opportunity to correct it at once, before it has had any consequences, and does not permit the party to lie by, without stating the ground of his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails to succeed, avail himself of an objection which, if it had been stated, might have been removed: *Insurance Co. v. Lew*, 21 Wall., 158; *Jones v. Osgood*, 2 Seld., 233.

We think these rules are correct in principle, and properly apply to this case.

4. The remaining assignment of error is, that the court of common pleas erred in overruling the motion to set aside the verdict and for a new trial.

The testimony, as reported in the bill of exceptions, does not, in our opinion, present a case which would authorize us to say that the court below erred in overruling the motion, on the ground that the verdict was not sustained by sufficient evidence.

Judgment affirmed.

McILVAINE, C. J., WELCH, WHITE and GILMORE, JJ., concurred.

JOHNSON v. PEOPLE.

(83 Ill., 431.)

LIQUOR SELLING: *Constitutional law — Evidence — Cumulative sentence.*

It seems that, in Illinois, if the title of a bill fully covers the subject of a bill at the time that it passes the senate, and afterwards its title is amended in the senate by less than a majority of the senators elect, if the amended title fully embraces the objects of the bill, and the bill, with the amended title, is passed by the house of representatives, and is in that form constitutionally passed through that body, the law is constitutionally adopted. It is not necessary that the title by which the bill passes both houses should be the same, so long as both titles fully cover the object and purposes of the bill.

Where there is a direct contradiction between two witnesses, it is for the jury to determine which is worthy of belief, and their determination ought not to be lightly disturbed.

Where it appears that one charged with selling liquor to minors, was engaged in making change for sales made by others, and that he made change on the very sale in question, he is just as guilty as though he had sold the liquor himself.

In order to constitute an unlawful sale of liquor to a minor, under the Illinois statute, it is not necessary that the respondent, or any one connected with him, should be the keeper of a dram-shop.

Where a cumulative sentence of imprisonment is passed on a conviction on several counts, the judgment should not fix the day and hour on which each successive term of imprisonment should commence, but should simply direct that each successive term should begin on the expiration of the one preceding.

WALKER, J. It is first urged, that the evidence fails to sustain a verdict of guilty under the sixteenth count, and that there was no other count under which plaintiff in error could have been convicted of sales actually made by him. Barton swears that plaintiff in error sold to him two glasses of beer, one for himself and the other for one Bitner. Plaintiff in error denies that there was any such sale; that he sold none to him, nor did he sell to any other person. Barton testified that he was eighteen years old.

There was a flat contradiction between the statements of these witnesses, and it was for the jury to judge of their veracity, and having done so, their action will not be lightly disturbed. The jury had the witnesses before them, and could see their manner of testifying, and they, no doubt, in determining the truth, took into consideration all the attending circumstances of the case. Plaintiff in error was deeply interested in the event of the trial, and the prosecuting witness was not, so far as this record discloses. This, of itself, for aught we can know, may have fully warranted the jury in giving credence to the evidence of the prosecuting witness. For anything we can know, the manner of plaintiff in error, when on the stand, may have been such as to satisfy the jury that he was unworthy of belief.

It is urged that the prosecuting witness was ignorant, and hence we should not give him credit for truth and veracity. He seems not to have known in what county Knox's Grove was situated. This may be true, and still the witness be entirely truthful as to what he does know. Men, with but few if any exceptions, are ignorant on some questions, and no one for that reason doubts their veracity. This objection was, no doubt, fully considered by the jury, and they were convinced that he spoke the truth, and we see no reason to say they were mistaken.

It is also urged, plaintiff in error was improperly convicted under the other counts—that he was simply employed to make change for the six or seven persons who were selling beer, lemonade, candy, etc. He and the others were acting in concert. They were carrying out a common purpose. He aided in making these sales if he gave change when the minors purchased the beer. He, to that extent, aided and assisted in making these sales. He thereby took an active part, and was one of the actors. It may be he was not as active as others, but, nevertheless, he acted conjointly with the salesmen. He made no protest against

such sales, and being present, and participating in what was done, the jury were warranted in finding that he knew beer was being sold to minors, and that he aided and abetted in such sales. It is next urged, that there is no averment in the indictment that plaintiff in error, or that any person with whom he was acting was the keeper of a dram-shop. The sixth section of the dram-shop act provides, that "whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian or family physician, *

* * for each offense shall be fined," etc. Now, there is no reference in this section to the keeper of a dram-shop. The language is sufficiently broad to embrace all other persons, as well as the keepers of dram-shops. The manifest object of this section is to prevent the sale or giving of liquors to minors, without the consent of parents, guardians, etc. To hold that it only applied to keepers of dram-shops, would do violence to the design of the general assembly in adopting this section. It is not necessary to now determine whether a person would incur the penalty of this section by giving it as an act of hospitality at his house, as that question is not before the court. The question here is, whether a person having, or not having, a license to keep a dram-shop may sell intoxicating drink to minors, and we think it is manifest he can not, without incurring the penalty prescribed by the law. It is also urged, that the act under which this prosecution was conducted is void, under our fundamental law. It is claimed, that whilst the body of the law was adopted on the call of the "ayes" and "noes," spread upon the journals of the senate, by a majority of all the senators elect, the title to the act only passed by a majority of a quorum. The journals show that twenty-four senators voted "aye," when it required twenty-six to be a majority of all the members elect. Does, then, the constitution require such a majority to adopt the title to a law? It is not required by the letter of the constitution. According to parliamentary usage, the title is not an essential part of a bill, although under our constitution it seems to be. Usage authorized it, and it was the custom to adopt the title to an act after its final passage.

But our constitution has worked a radical change in this usage, as it provides (art. 4, sec. 13), that "every bill shall be read at large on three different days, in each house, and the bill and all amendments thereto shall be printed before the vote is taken on

its final passage; and every bill, having passed both houses, shall be signed by the speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." This is all of the section which seems to be important in the consideration of the question now before us.

In the case of *Brinz v. Weber*, 81 Ill., 288, in passing on a similar provision in the constitution of 1848, applicable to private laws, we said that the validity of the act must depend, under such a provision, upon the title to the bill as it passed both houses, and not on the title to the law after its adoption. What we there said, we think applies to the requirements of our present constitution, as to the adoption of general laws. Hence we regard it unnecessary to further discuss this question. Is, then, the title by which the bill was passed, sufficient to sustain the law? The title, as the bill passed the senate, was: "A bill for an act to revise the law in relation to licenses." For the bill, with this title, twenty-nine senators voted, and eleven against. After the bill had so passed the senate, on motion, the title was so changed as to read: "A bill for an act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors." The change in the title was adopted by "ayes, 24, noes, 11." As thus amended, the bill was sent to the house, where it was constitutionally passed through that body, with the title as amended in the senate, and was returned to that body, and all the requisite subsequent steps were taken for it to become a law.

On turning to the chapter entitled "License," in the Revised Statutes of 1845, we find that the first eight sections refer to licensing peddlers, auctioneers and merchants. Sections from nine to twenty-one, inclusive, relate to the sale of liquors and licenses therefor. Sections from twenty-two to twenty-eight, inclusive, relate to licensing insurance companies, and for the collection of penalties incurred under the chapter, and the disposition of the money collected for forfeitures. Thus, it will be seen, the law in relation to the license and sale of intoxicating liquors was found in this chapter, and when the bill passed the senate, with the original title, that title certainly referred to the chapter regulating liquor licenses, and embraced such licenses, and that subject was expressed in the title. It may be that licenses to sell liquor were not specifically named in the title, but it was undoubtedly so expressed as to call the attention of every senator

to the subject matter of the bill, and we have no doubt that this general expression of the subject of the bill answers the constitutional requirement. The provision does not require that the subject of the bill shall be specifically and exactly expressed in the title, hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.

This title calls attention to the chapter regulating licenses, and that chapter provided for licensing saloons, and as all the law on the subject was then only found under the title of that chapter, we presume every member of the senate knew, by the title, that the bill proposed to revise that chapter, and in doing so that it would almost necessarily affect liquor licenses. Had the bill been specific, and the title had proposed to license lawyers, physicians, druggists, or some other occupation, and the bill had contained the provisions as it was adopted, then this requirement of the constitution would have probably rendered the law inoperative. But it was general, and expressed the subject of the bill generally, but with sufficient distinctness to answer the constitutional requirement, so that if the title must be adopted as is the bill on its final passage, a sufficient title was so adopted when the bill passed the senate. It does not matter in what manner the title was subsequently changed by the senate, so the title thus changed called the attention of the house to the provisions of the bill, and the title under which the bill went to the house was specific and certain for that purpose. We have no hesitation in saying the bill was properly and constitutionally passed into a law, and must be enforced.

But the court below erred in the judgment it rendered on the verdict in this case. It fixed the day and hour when the imprisonment should commence under each count upon which plaintiff in error was found guilty. Since a *supersedeas* was granted in this case, it has become impossible that the judgment of imprisonment can be carried into effect, as the time fixed by the court has elapsed and expired. Other contingencies might arise which would render it impracticable to carry such a judgment into effect. The sentence to imprisonment should be for a specified number of days under each count upon which a conviction is had, and the judgment should require that the imprisonment under each succeeding count should commence where it ends under the preceding count, without fixing the day or hour

for each or either to commence or end. For this error the judgment of the court below must be reversed, and the cause remanded with directions that the court enter a proper judgment on the verdict.

Judgment reversed.

NOTE.—For a full collection of the authorities on the subject of cumulative sentences, see note to *Prince v. State*, 1 Am. Cr. Rep., on p. 548.

ALBRECHT V. STATE.

(78 Ill., 510.)

LIQUOR SELLING: *Act of hospitality not within the statute.*

The act, title "Dram Shops," whose full title is, "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors" (R. S. of Ill., 1874, p. 438), is not aimed against, and does not include ordinary acts of hospitality.

A brewer who gives beer to a person who comes to see him at his house on business, is not liable under the provisions of section 6, which provides as follows: "Whoever, by himself or his agent or servant, shall sell or give any intoxicating liquor * * * to any person intoxicated, * * * shall, for each offense, be fined," etc., even though such person is under the influence of liquor.

BRESEE, J. This was a prosecution, by indictment, in the circuit court of Bureau county, against Jacob Albrecht, for an alleged violation of chapter 43, R. S. 1874, p. 438, title "Dram Shops." The title of the act, in full, is, "An act to provide for the licensing of, and against the evils arising from, the sale of intoxicating liquors."

The sixth section of the act provides as follows: "Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall, for each offense, be fined not less than twenty dollars nor more than one hundred dollars, and imprisonment in the county jail not less than ten nor more than thirty days." The previous sections define: 1. Dram shops; 2, provides penalty for selling without license; 3, how license may be granted; 4, the form of the license, the rights under it, and how revoked for violation of the provisions of the act, or by keeping a disorderly or ill-governed house, or place of

resort for idle or dissolute persons, or by allowing any illegal gaming in the dram shop, or in any house or place adjacent thereto; 5, provides for taking bond of the dram-seller, and how suit may be brought thereon. This statute is highly penal in its provisions, and is emphatically a penal statute, and, according to well recognized canons, must be construed strictly, keeping in view the great central object the legislature had in view in its enactment, and the evils to be prevented. The title of the act, in the revision of 1874, is "Dram Shops," and every section is leveled against them, with a view, not to their suppression, for they are licensed to sell intoxicating liquors, and pay large sums of money into the town or county treasury for the privilege. The provisions of the act are aimed at such. What, then, under this view of the statute, should be the construction to be put on the sixth section? Can it be, should it be, other than this: that whoever, keeping a dram shop, shall, etc.?

The leading facts in this case are: that the defendant was the owner and operator of a brewery, selling the manufacture by the keg or barrel to any one who wished to purchase, and for the privilege he became liable to pay to the government of the United States large sums of money, demanded by the internal revenue laws, to be appropriated to the payment of our government debt. He kept no dram shop, nor did he sell his beverage by the small, to be drank on his premises. One day about the last of July or first of August, 1874, Charles Dewey, the person to whom it is alleged defendant sold or gave one or more glasses of beer, came to see defendant, who was then in bad health and nearly blind, lying on a lounge in his house, apart from his brewery, for the purpose of getting a renewal of a lease of some lots at Ohio station, on which he had erected a hay press. He was accompanied by Mr. Kyle, an attorney-at-law, who was wanted by Dewey to draw the papers. When Dewey and Kyle reached the house, and found defendant in this condition, they also found Andrew Ross there, and Samuel Connor, the principal witnesses for the prosecution. Ross's business there, he being a preacher, was to aid Connor in purchasing some lots of defendant, and to see about the two lots on which Dewey had his hay press, for the purpose of building a mill upon them. Ross had talked about this with defendant, when Kyle and Dewey came in. Dewey wanted to buy the lots, as it would be expensive to move his press, which had cost him eighteen hundred dollars.

Ross, in his testimony, says, he supposes Dewey thought he was trying to get these lots, and he got mad and talked pretty loud, and was "a little boozy." Connor, on his cross-examination, says he wanted to buy some lots; Kyle and Dewey came in and went off together; Dewey was considerably excited: he thought he would lose considerable in moving his press, and was much excited at Ross. On his direct examination, he says Dewey seemed a little tight—was intoxicated; called for beer twice; some person went into another room and brought it out, and set the beer and glasses on the table, and all were invited to partake. Ross being a preacher, of course, declined, never having drank intoxicating liquors. Connor never drank anything intoxicating, and never was drunk.

The opposing testimony of Kyle, Dewey and defendant, shows quite conclusively Dewey was not intoxicated; that the beer was sent for to the brewery, and proffered by defendant to his visitors as an act of hospitality to neighbors and friends. Surely, it was not such an act as this the statute in question was intended to punish by imprisonment in the county jail. It has nothing of the odor of a dram shop about it, and was but a mere courtesy which this law was not designed to reach. If one invites his friends to dine with him, and generous wine, which cheers the heart, is pressed upon the guests, one of whom happened to be excited with wine when he came there, is the host to be incarcerated for giving to this most bibulous guest an additional glass? We do not think the statute should bear such a construction. The culture of the grape is recommended by the moralist and the economist, and the expression of its juices into wine. Would it be held an offense, punishable by fine and imprisonment, should the vintner, from his wine press, fill a flagon and serve it to his guests in his own house, at his table? Where is the difference in a brewer presenting a tankard under similar circumstances? We cannot believe this law was designed to punish such acts.

The testimony, we think, is quite sufficient to show Dewey, though highly excited at what he believed to be the interference of Ross to get these lots, was not intoxicated. He swears positively he had drank, during the day and before dinner, but three or four glasses of beer, and that he was not intoxicated in the slightest degree. There is not the slightest proof Dewey was in the habit of getting intoxicated.

A jury was waived in this case, and we think the finding of the court was against the clear preponderance of the evidence, and the case made was not one contemplated by the sixth section of chapter 43, title "Dram Shops."

The judgment must be reversed.

Judgment reversed.

NOTE. —In *Carfoss v. State*, 42 Md., 403 (S. C., 1 Am. Cr. Rep., 460), it was held that a statute prohibiting, among other things, the giving away of spirituous liquors on election days by any person, extended to and included acts of hospitality in a private house.

ARCHER V. STATE.

(45 Md., 33.)

LIQUOR SELLING: *Evasion — Evidence.*

The evidence against the respondent, who was charged with selling liquor without a license, tended to show that he sold cigarettes, worth from a quarter to half a cent each, for ten cents a piece, and that he gave a drink of whisky to every one who bought a cigarette. Held, that this evidence fairly tended to show that the real transaction was a sale of the whisky, and that it was for the jury to say whether or not the pretended sale of the cigarettes was not a mere evasion and subterfuge, intended to cover the sale of the whisky.

In such a case the prosecution have a right to press an unwilling and reluctant witness with searching questions, and to call out any and all facts which have any tendency to throw light on the real nature of the transaction.

In such a case the defendant has no right to prove that in other cases he had treated people to whisky under circumstances that did not constitute the giving of the whisky a sale; or that he had, in some instances, refused to sell whisky either directly or covertly. Proving that he had not violated the law on other occasions would have no tendency to prove that he had not violated it in the matter for which he was being tried.

Even though the court permits an illegal or improper question to be put to witness, against the objection of the respondent, the respondent is not injured, and cannot complain, if the answer is one which does not prejudice him.

Evidence of similar sales of cigarettes, and of the giving of whisky in connection therewith on other occasions, is admissible for the purpose of explaining the transaction in question in this case.

MILLER, J., delivered the opinion of the court.

The appellant was indicted for selling on the tenth of May,

1875, one-half pint of whisky to Samuel M. Whiteford, with a view to profit, in the prosecution of a regular trade and business, without having obtained a license so to do.

At the trial four exceptions were taken to the rulings of the court, upon the admission of testimony.

Before noticing these rulings in detail, it is proper to observe that it appears from the testimony in the case that the traverser, who had no license to sell spirituous liquors in less quantities than a pint, kept cigarettes for sale, and invited the purchasers of them to drink whisky with him. There can be no question, that if the price asked for the cigarettes was intended to cover the price of the whisky, which was afterwards nominally given to the purchasers, the transaction was a sale of the whisky, as well as of the cigarettes. Such an attempt to evade the law is a very shallow one, and testimony tending to show that this was the real character of the transaction, was admissible to establish the offense for which the traverser was indicted. We shall now consider the several exceptions in their order.

First exception.—On the part of the state, the witness Whiteford testified that he went to the traverser's place of business, on the tenth of May, 1875, and paid him forty cents and got four cigarettes. He was then asked what these cigarettes were worth, to which he replied he did not know. The state then asked him what was his opinion or judgment as to the value of them, and to the asking of this question the traverser objected. We see no error in the ruling allowing it to be put. It was important to the issue, and admissible, to show the actual value of these articles, as compared with what he paid for them, and, as he was evidently a reluctant witness, it was proper, after his previous answer, to press him with the question as to what was his judgment of their value. It was not necessary to inquire first whether he was an expert as to the value of such an article.

Second exception.—The witness then stated that these cigarettes were a parcel of tobacco wrapped in paper, and might be worth a quarter to a half cent each, but he was not a judge of tobacco. The state then put to him the question, whether there was anything in the previous acts or declarations of the traverser which induced him to believe, that if he called for cigarettes, or paid him at the rate of ten cents a piece for them, that he would get in return anything besides the cigarettes for the same money, and, if so, to state what had occurred to induce him so to think.

The traverser objected to the asking of this question. We think the court was right in allowing it to be put. An affirmative answer, accompanied with a statement of such previous acts and declarations of the accused, would clearly have been admissible and competent evidence. But, if we are wrong in this, it appears by the subsequent exception the witness answered the question in the negative, and hence no harm was done to the traverser by the ruling excepted to.

Third exception.—The witness having answered the previous question in the negative, was then (as he should have been at first) required to state all that occurred when he went to this place on the day in question, and he replied that he and four others went there, that he called for four cigarettes, and paid forty cents for them; we were afterwards invited into another room and took a drink and came out; there was a shelf or counter to the left of the door; we walked in and took whisky; there were glasses and a bottle there; saw but one either time; was some talk in there; went in first time with Barton—last time with Johns; cigarettes were handed round; got one and took a drink. In reply to questions by the traverser's counsel, on cross-examination, he said he never bought whisky from the traverser, and never had any contract, understanding or agreement with him, under or by which he was to give him whisky if he bought cigarettes or anything else. Upon re-examination the state asked him whether, from anything which had already occurred between him and the traverser, or in the presence of the latter, he expected, when he went back with his four friends, as previously stated, to get whisky for the money he paid, and, if so, how, and why he expected it. To the asking of this question the traverser objected. In view of what the witness had stated on his cross-examination, we are of opinion there was no error in allowing this question to be asked him. His reply to it, contained in the next exception, explains his testimony on cross-examination, and must have tended strongly to convince the jury that the transaction in question was in fact a sale of the whisky, and so intended to be by the traverser. He said, in reply to this question, that the action of others at the traverser's place of business, induced him to think that he could get whisky if he bought cigarettes, as they had done, so he went to the traverser's, bought cigarettes, as he saw them do, and got whisky also. There can, we think, be no doubt of the admissibility of

this evidence. It was for the jury to decide, upon all the testimony before them, whether the traverser was guilty of selling whisky to this witness, and the fact that he did not sell it to him was not conclusively established by the mere declaration of the witness, that he did not buy it.

Fourth exception.—The state then proved, by other witnesses, that on many and repeated occasions in this month of May, they went to this place with their friends, and called for cigarettes, for which ten cents a piece was paid and that then they were invited into a back room, by the traverser, to take a drink of whisky, and there were as many drinks as cigarettes so obtained; that in this back room he had a bench or counter, with a shelf under it, and bottles and glasses, and that these arrangements had been made and fitted up about the last of April or the first of May; that during this month of May the traverser sent empty demi-johns, sometimes two and sometimes three a week, down to Baltimore, to a grocer and liquor dealer, and had full ones brought back, sealed up. The state also proved declarations of the traverser, made about the time of this alleged sale of whisky to Whiteford, to the effect that he had once before seen a little shebang in a place where all the taverns were closed, and that he would have to be watchful and know who to sell to, and that once, when handing the bottle out to a friend in this back room, he said he intended to do this to spite the tavern-keepers, because they bought the tobacco and cigars which they sold from peddlers, instead of from him, and that he could not do this if there was such a law as there was in Worcester county, prohibiting the giving, bartering and selling of liquor.

The defense then offered to prove that during the month of May, before the finding of this indictment, witnesses had bought various articles in which traverser dealt, such as tobacco, cigars, snuff, pipes, etc., for which they paid full value and got full value in return, and that upon these occasions they were invited by the traverser to take a drink with him; that others, when settling bills, were so invited, and that this custom of his with the witnesses of inviting them to drink, sometimes when making purchases and sometimes when not, had extended over a period of seven or eight years, and during the months of April and May of the present year; that a doctor and apothecary had offered to purchase whisky from him during the month of May, and that he would not give or sell any to him at any price; that

sick persons, during this month of May, had offered to buy anything in his shop if he would let them have some whisky, and he refused.

In our view of it, this offered testimony amounts simply to this, that upon other occasions, and with other parties, the traverser did not violate the law, and in other instances sold in good faith, and at their full value, articles which he had a license to sell. In our judgment, such testimony was clearly inadmissible. It seems to us to have no tendency to rebut, control or explain any of the testimony offered on the part of the state. "Proof that a man has violated the law in particular instances, cannot be rebutted by proof that he did not violate it in other instances when he had the opportunity, and was tempted to do so:" *Commonwealth v. Barlow*, 97 Mass., 597. We, therefore, find no error in the ruling rejecting this testimony.

Ruling affirmed.

STATE V. MAHONEY.

(23 Minn., 181.)

LIQUOR SELLING: *Unlawful sale by agents.*

The defendant, being a licensed saloon keeper, was charged with unlawfully selling liquor to a habitual drunkard. The only evidence against him was proof of a single unlawful sale by his clerk. *Held*, that this testimony was insufficient to justify a conviction, the presumption being that the clerk had authority only to make lawful sales.

GILFILLAN, C. J. The defendant was charged with unlawfully selling spirituous liquor to an habitual drunkard. The only proof of the fact was, that the person alleged to have been an habitual drunkard, bought spirituous liquor from defendant's clerk, there being no evidence of the defendant being present, nor of his having given the clerk authority to sell to this particular person, or to any habitual drunkard. The sale by the clerk was made at defendant's saloon, where he appears to have carried on the business of selling liquors, apparently under a license. The presumption, from a clerk being employed at the saloon, would be, that he had authority from the defendant to make such sales as were lawful. A single unlawful sale by such clerk would not raise any presumption that his master had given him

authority to violate the law: *Parker v. State*, 4 Ohio St., 563. There is no proof to connect defendant with the illegal act of the clerk, and the judgment must be reversed, and a new trial ordered.

The following note is kindly contributed by the editor's law partner, Michael Firnane, Esq., and will be found to contain all the cases:

NOTE.—On the question how far the relations of principal, agent, master and servant, and parent and child, are affected criminally by the unlawful selling of liquor, the decisions do not seem to be uniform.

Where a clerk or agent unlawfully sells liquor with the knowledge and consent of the principal, they are both guilty: *French v. People*, 3 Parker, 114; *Schmidt v. State*, 14 Mo., 137; *Thompson v. State*, 5 Humph., 138.

Even where the defendant was only employed in making change for those engaged in the unlawful selling: *Johnson v. People*, 83 Ill., 431.

It was held in *Com. v. Nichols*, 10 Metc., 259, that an unlawful sale of liquor by the servant or agent of the owner, would be *prima facie* evidence of the assent of the latter to the sale.

This is a stronger statement of the rule than the weight of authority will warrant. The rule in criminal cases is, that the prosecution must prove the defendant's guilt *beyond a reasonable doubt*. It is for the jury, and not for the court, to weigh the evidence, and to say when proof sufficient has been adduced to convict. If the court, as a matter of law, can tell the jury when a *prima facie* case has been made out, then the court must have the right to weigh and scrutinize the testimony, and draw inferences of fact. Since this is the exclusive province of the jury, the expression, a *prima facie* case, has little or no significance in criminal practice.

The more correct rule is laid down in *State v. Bonny*, 39 New Hamp., 206. In this case a sale of liquor, contrary to the law, was proved at defendant's public house by his servant. It was held by the court, that this was a *circumstance* tending to prove that the defendant was engaged in the traffic of liquor selling, and also to establish the authority of the servant to make the sale in question, leaving the jury to say how strong this circumstance might be in connection with other facts in the case.

It seems that the mere fact that the person who sold the liquor was behind the counter of the saloon of the defendant, without showing some other fact tending to prove his authority, is not, of itself, sufficient to convict: *Ander-son v. State*, 37 Ind., 553.

Where a clerk or bar-keeper in a saloon sells liquor unlawfully, without the knowledge and against the instructions of his employer, given in good faith, then the latter is not criminally responsible for the act: *Lothrop v. State*, 1 American Crim. R., 486, and cases there cited.

Where a wife makes an unlawful sale in her husband's presence, the jury may, from this fact, infer his guilt: *Hensly v. State*, 1 American Crim. R., 433; *Com. v. Reynolds*, 114 Mass., 306; *Com. v. Kennedy*, 119 Mass., 211. And it is not necessary that he should be in the same room: *Com. v. Burk*, 11 Gray, 437.

To convict a husband for the unlawful selling, by his wife, of spirituous liquor in his store, in his absence, the jury must be satisfied, beyond a reasonable doubt, that her illegal act was done by his authority; mere proof that she was his clerk, or agent, is not sufficient: *Seibert v. State*, 40 Ala., 60; *Com. v. Murphy*, 2 Gray, 510.

If one partner sells ardent spirits in the absence and without the knowledge or consent of the other, the latter is not liable: *Acree v. Com.*, 13 Bush (Ky.), 353.

Where the sale is made to an agent, the indictment therefor may charge the sale to have been made either to the principal or agent: *State v. Wentworth*, 35 New Hamp., 442.

But where the agent informed the defendant that she was acting as the agent of other parties, the allegation of the sale to the agent will not be sustained: *Com. v. Remby*, 2 Gray, 508.

There are many cases which hold that, on a charge of selling to a minor, delivery of the liquor to him is sufficient evidence of sale, and it is sense that a person to whom the liquor might lawfully have been sold, the minor for it, with the money, and that the defendant was so told when he let the minor have it: *State v. Fairfield*, 37 Maine, 517, and cases there cited.

The contrary and better doctrine, and the one supported by most authority, is laid down in a recent and well considered case: *Com. v. Sallenville*, 120 Mass., 385.

SCHWARTZ v. COMMONWEALTH.

(27 Gratt. [Va.], 1025.)

PERJURY: *Sufficiency of evidence.*

On a trial for perjury, evidence simply that the defendant had at one time sworn to one state of facts, and afterwards changed his testimony, and, admitting that he had sworn falsely, testified in direct contradiction of his first statement, is not sufficient to justify his conviction. The prosecutor must prove which of the two statements is false, and must corroborate the true statement of the prisoner by independent evidence, *i. e.*, by evidence other than his own statements and declarations.

This was an indictment for perjury in the hustings court of the city of Manchester. On the trial the jury found the prisoner guilty, and assessed his fine at one dollar, and the court sentenced him to imprisonment in the jail of the city for one year. There was a number of exceptions taken by the prisoner to rulings of the court; but this court only considered the question on the motion for a new trial, on the ground that the verdict was not sustained by the evidence. The facts are set out in the opinion of Judge Staples. On the application of the prisoner this court awarded him a writ of error.

G. Wise, for the prisoner.

The Attorney-General, for the commonwealth.

STAPLES, J. The prisoner was indicted for perjury in the hustings court of the city of Manchester, and was convicted and sentenced to confinement in the jail of the city for one year. After the verdict was rendered, he moved the court to grant him a new trial, upon the ground that the verdict of the jury was contrary to the law and the evidence. His motion was overruled, and the prisoner excepted. His bill of exceptions contains all the facts proved on the trial, from which it appears that the prisoner was examined as a witness upon the trial of Joseph Turner, before the mayor of Manchester, upon the charge of rape, and upon the examination the prisoner testified that he had no conversation or plot with the said Joseph Turner, before they left Manchester, to commit rape upon Pallas Boyd; that he and Turner went to the locality of the alleged offense for the purpose of getting flowers, and that he heard no screams from the girl, Pallas Boyd, whilst Turner had her in the bushes; that the commonwealth attorney asked that his testimony be written down; that a pause in his examination of two or three minutes ensued, during which time the prisoner was retired from the witness stand; that the prisoner, during this interruption, stated to Mr. Fitzgerald, a police officer, to Mr. Redford, a by-stander, and to the commonwealth's attorney, that he had sworn falsely in his testimony just given; that he had done so to screen Turner, and that when he went back on the stand he would tell the truth; that the prisoner was then put on the stand again as a witness, no other witness intervening, and testified that he and Turner had had a bargain and conversation about the girl before they left Manchester, and that he did hear screams from the girl while Turner had her in the bushes; and thereupon the said mayor refused to hear him further. It was further proved that the prisoner was not warned by said mayor that he had a right to refuse to answer questions put to him; that he had no counsel; that he appeared somewhat confused, but not more so than is usual with witnesses; and that he is in the fifteenth year of his age. And these were all the facts proved on the trial.

The charge in the indictment is of perjury in the first statement before the mayor; and the evidence relied on to establish the perjury is the contradictory statement before the same officer

at a subsequent period of the same examination. As will be seen from the bill of exceptions, this contradictory statement was the sole and only proof adduced by the commonwealth in support of the indictment.

The question we are to determine is, was he properly convicted upon that evidence?

No rule is, perhaps, better settled than that to authorize a conviction of perjury, there must be two witnesses testifying to the falsity of the statement, or one witness, with strong corroborating circumstances, of such a character as clearly to turn the scale and overcome the oath of the party and the legal presumption of his innocence. This rule is founded upon the idea that it is unsafe to convict in any case where the oath of one man merely is to be weighed against that of another. Lord Tenterden is reported to have said that corroborating circumstances are not sufficient, but that the contradiction must be given by two witnesses. But the rule is now settled otherwise; the confirmatory evidence, however, must be of a strong character, and not merely corroborative in slight particulars. It was at one time held that when the same person has, by opposite oaths, asserted and denied the same fact, he may be convicted on either; for whichever of them is given in evidence to disprove the other, the defendant cannot be heard to deny the truth of that evidence, inasmuch as it came from him. But this doctrine has been long since exploded, and it is now held that the prosecuting attorney must elect which of the two oaths he means to rely upon as false, and he must prove the perjury in that particular statement. Two early English cases are sometimes cited as holding that the perjury may be established by proof of the contradictory oath merely, without other evidence. One of these is an anonymous case decided by Yates, J., at the Lancaster assizes in 1764, and the ruling approved by Lord Mansfield. The other is the case of *Rex v. Knill*, a short report of which is found in a note in Barnwell & Alderson R., page 929. It is shown, however, in 2 Russell on Crimes, 652, that in each of these cases there were corroborating circumstances in addition to the contradictory oath. But if these cases even go to the extent which is claimed for them, they are overruled by the later English decisions. And it is now held by those courts that the defendant's own evidence upon oath is not sufficient of itself to disprove the evidence on which the perjury is assigned.

In *Regina v. Wheatland*, 8 Car. and Payne R., 238, Mr. Baron Gurney held that it was not sufficient to prove that the defendant had, on two different occasions, given direct contradictory evidence, although he might have willfully done so; but that the jury must be satisfied, affirmatively, that what he swore at the trial was false, and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn contrary at another time; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate as proved that the evidence given by the defendant at the trial was false.

In *Regina v. Hughes*, 1 Car. and Kirwan, 519, Tindall, C. J., said: "If you merely prove the two contradictory statements on oath, and leave it there, *non constat*, which statement is the true one." See, also, *Mary Jackson's Case*, 1 Lewin, 270; 2 Russell on Crimes, 651-652; Roscoe's Crim. Evidence, 767-768.

In the United States there are but few decisions bearing upon the question. The writers on criminal law, however, lay down the rule in conformity with the English cases: 3 Wharton, sec. 2275; 2 Bish. Crim. Law, sec. 1005; 1 Greenl. Ev., 259.

The only opposing case is that of the *People v. Burden*, 9 Barb. R., 469. There, Johnson, J., delivering the opinion of the court, enters into an elaborate discussion of the whole subject, and arrives at the following conclusions: "That where a defendant, by a subsequent deposition, expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that such former one was intentionally false at the time it was made, he may be properly arrested upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions." To maintain his position, the learned judge relies upon the two English cases already mentioned, not advertent, however, to the fact that there were corroborating circumstances in each of them. The distinction he seeks to establish is not recognized by any adjudicated case, or by any writer on criminal law. This proposition is, that the first oath of the prisoner must be held to be false, because in the second he admitted it to be so. In other words, when the prisoner has made two contradictory statements under oath, and in the second he has acknowledged the intentional falsity of the first, that acknowledgment is sufficient to

establish the perjury of the first, without further evidence. And it is asked why may not the prisoner be convicted of perjury upon his mere confession, as in other cases.

It is not denied that a full judicial confession is, perhaps, sufficient to found a conviction upon in any case. It is substantially the same as a plea of guilty to the indictment. But it is denied that a mere admission, not judicial, of having sworn falsely, dispenses with all further proof of the fact. As before stated, when there are two conflicting statements, under oath, the prisoner cannot be convicted upon either, for the reason, say the judges, it is not possible to tell which is the true and which is the false. In such case it is agreed on all hands, that strong confirmatory evidence is essential. It is gravely insisted that this confirmatory evidence is fully supplied by the prisoner's acknowledgment of the falsity of the first statement. Why may not the acknowledgment itself be false?

If the second oath, deliberately taken, is insufficient to overcome the first, why should a mere admission have that effect? When a witness deliberately asserts a fact to be true, as within his knowledge, and in a few minutes thereafter deliberately and intentionally asserts the very reverse, as within his knowledge, all ground of innocent mistake being excluded, he thereby indirectly but unequivocally affirms the falsity of the first. Do we discredit the first any sooner, or believe the second the more readily, because the witness tells us that one was intentionally false and the other true? We believe neither of them. We place no confidence in either statement, from an absolute inability to determine which is true, or whether either is true. If the witness is afterwards put on his trial for perjury, our difficulties are in no wise removed. We are still in doubt which is the true and which is the false. It is very true, that a witness making two palpably conflicting statements, may sometimes, by his demeanor, satisfy the hearer that one is to be credited rather than the other. But when these statements are repeated to a third person, it is very difficult, if not impossible, to detect the false without some aid from surrounding circumstances. And no mere asseveration of the witness will assist the mind in arriving at a just and accurate conclusion. If the witness is to be convicted of perjury upon his bare declaration that the first statement is false, it is not because we believe his declaration is necessarily true, but upon some idea that it is in the nature of a

confession, and therefore to be believed. A deliberate confession of guilt is generally credited, because it is presumed to flow from the highest sense of guilt. It must be remembered, however, that there are two statements upon oath, and if the prisoner is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and the prosecutor might select either as the ground of his proceeding. In this very case the commonwealth might have elected to proceed upon the second statement made by the prisoner. In that event, all will concede he must have produced other testimony in addition to the contradictory statement first made. Is it possible that the principle is so reversed, and is of so little value, that the prisoner may be convicted of perjury upon the first merely because, upon his second examination, he admitted the first did not contain the truth.

If this be so, the rule laid down, that in case of two conflicting statements there can be no conviction unless there is corroborative evidence, is not of the slightest value. When we speak of corroborative evidence, we do not mean such as emanates from the mouth of the prisoner himself, but evidence *aliunde*, evidence which tends to show the perjury independently of his own declarations.

The whole law in reference to perjury is based upon the idea that when there is witness against witness, oath against oath, there must be other evidence to satisfy the mind.

The rule is thus laid down in 1 Greenleaf, sec. 265: "If the evidence in proof of the crime of perjury consists of two opposing statements of the prisoner, and nothing more, he cannot be convicted. * * * If both the contradictory statements were delivered under oath, there is nothing to show which of them is false, where no evidence of the falsity is given." See, also, *Dodge v. State*, 4 Zabriskie, 455. This is a sound rule, and ought not to be departed from to meet particular cases. In this connection it may be mentioned that the decision in the New York case was made by two judges, in a court of three—Judge Selden dissenting.

The case now in hand is a strong illustration of the value of the rule in question. The prisoner was a youth of fifteen, charged before the same magistrate with being implicated in the crime of rape, and acquitted but a few minutes before. Upon his examination he was without counsel or advice, and was not

cautioned that he was not bound to criminate himself. His examination had not been completed, but merely suspended; and during this interval he is said to have made to officers of the government the statement upon which his conviction is founded. Before he had concluded he was stopped by the mayor, in the midst of his narrative, and forbade to say more. What he would have further said we cannot even conjecture. So great is the abhorrence of the crime of rape, that the passions and suspicions of men are more easily excited than by any other accusation. When, therefore, the prisoner confessed his complicity in the crime, ready credence was given to the statement. If, in his first statement he had made the same confession, and in his subsequent examination denied it, it is easy to see that the perjury would have been charged in the last, and not in the first. And yet, without the aid of other evidence, the one statement was entitled to no greater consideration than the other. Upon the whole, I think the prisoner was improperly convicted upon the facts as presented to the jury.

With respect to the instructions, my opinion is, that no error was committed by the court, either in refusing those asked for or in giving those that were given. Upon the points presented by the second bill of exceptions, it is unnecessary to express any opinion, as the question will probably not again arise.

Judgment reversed.

HARRIS V. PEOPLE.

(64 N. Y., 148.)

PERJURY: *Fire marshal of New York — Evidence — Variance — Verdict.*

Under the New York statutes, the fire marshal of New York city has authority to investigate and examine into the origin of fires, and to take sworn evidence with relation thereto, on his own motion, and false swearing on such an investigation is perjury. On a prosecution for perjury for false testimony given on such an examination, it is of no consequence that no sworn complaint had been made to him.

It was objected, in the appellate court, that there was a fatal variance between the indictment and the proof, the indictment alleging that the respondent had sworn that at the time of the fire he had sixty thousand cigars in the building, and the proof showing that he had sworn that he had sixty-five thousand cigars in the building. This objection was not made at the trial. *Held*, that the variance was not material; that if it was, it could not be regarded, the objection not having been made at the trial.

There were two counts in the indictment, the first charging perjury in the oral testimony given before the marshal, and the second charging perjury in swearing to an affidavit before the same officer, containing, in substance, the same matters testified to orally. The jury found the defendant not guilty under the first count, and guilty under the second. It was claimed that the verdict was fatally inconsistent. *Held*, that inasmuch as it appeared that the fire marshal was not present when all the oral testimony was given, there was no inconsistency in the verdict.

EARL, J. The plaintiff in error was convicted of perjury in the general sessions of the city and county of New York, and was sentenced to ten years' imprisonment in the state prison. The perjury is alleged, in the indictment, to have been committed on the 13th day of September, 1873, before George H. Sheldon, fire marshal of the city, who was, at the time, investigating the cause, origin and circumstances of a fire which occurred on the 5th day of September, 1873, in a building occupied by Harris and his partner as a tobacco manufactory. Upon the investigation, Harris swore that at the time of the fire he was not in the city of New York, but that he was in the city of Troy. He also swore that, at the time of the fire, there was in the building a stock, belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound; 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound, and that he and his partner sustained a loss by the fire of between \$5,000 and \$6,000. The facts thus sworn to were alleged in the indictment to have been false, and evidence was given upon the trial tending to show that they were all false.

It was claimed upon the trial, on behalf of the prisoner, that the fire marshal had no power or authority to administer an oath to Harris, and this is the first ground of error alleged here. To show that it has no foundation, little more is needed than to bring together the statutes relating to the powers and duties of the fire marshal.

It was provided, by section one, chapter 332, of the laws of 1852, as amended by section 36, chapter 579, of the laws of 1857, that the general superintendent of police of the city of New York was "authorized and required to make an investigation into the origin of every fire occurring in said city," and for that purpose he was invested with the same powers and jurisdiction as were possessed by the police justices of the city. The police justices had jurisdiction, upon complaint made to them, to sub-

poena and swear witnesses for the purpose of ascertaining whether any crime had been committed (2 R. S., 707). In 1868 (chap. 563) an act was passed creating the "office of metropolitan fire marshal, and prescribing its powers and duties." He was to be appointed by the board of metropolitan police. And section two made it his duty "to examine into the cause, circumstances and origin of fires by which any building, vessels, vehicles, or any valuable personal property shall be accidentally or unlawfully burned, destroyed, lost or damaged, wholly or partially, and to especially inquire and examine whether the fire was the result of carelessness or the act of an incendiary." He was directed to take the testimony, on oath, of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matter to be examined and inquired into, and to cause the same to be reduced to writing and verified. By section three he was empowered to issue a notice, in the nature of a subpoena, to compel the attendance of any person, as a witness, before him to testify in relation to any matter the subject of inquiry and investigation by him. He was authorized to administer oaths to the witnesses, and it was provided that false swearing in any matter or proceeding before him, should be deemed perjury, and punishable as such. The next statute upon the subject was passed in 1870 (chap. 383, sec. 21), and simply provided that the board of police of the city of New York should have the power to appoint a fire marshal, who should have the like powers and perform the like duties as those provided by the statute of 1868, above referred to. In 1871, by section four, chapter 584, it was provided that all the provisions of the statute of 1868, "creating the office of metropolitan fire marshal, and prescribing the powers and duties thereof, shall be and remain in force as applicable," and that, "for the purpose of investigating the origin of fires, incendiary or otherwise, and bringing to punishment the parties guilty of arson, the said fire marshal is hereby invested with the same powers and jurisdiction as were heretofore conferred upon the superintendent of police of the city of New York in relation thereto," under the statute of 1852, as amended in 1857, above referred to. By section 76, chapter 335, of the laws of 1873, an act to re-organize the local government of the city of New York, it was provided as follows: "Another bureau shall be charged with the investigation of the origin and cause of fires, the principal officer of which shall be called fire

marshal, who shall possess all the powers and duties now possessed and performed by the fire marshal appointed pursuant to chapter 383, laws of 1870, and chapter 584, laws of 1871, and the acts amendatory or supplementary thereof."

The claim made on behalf of the plaintiff in error is, that under these statutes the fire marshal had no authority to institute an investigation and inquiry into the circumstances of a fire, without a complaint is first made to him. It is entirely clear, however, from the language used, as well as from a consideration of the purposes of the statutes, that a complaint is not necessary to call into action the powers of the fire marshal. He has all the authority conferred by the statute of 1852, as amended in 1857, upon the superintendent of police. That statute conferred the authority and imposed the duty to investigate. No complaint was necessary, but in conducting the investigation the superintendent was invested with the power and jurisdiction of police justices, and they had authority to subpœna witnesses and swear them. He also had the authority conferred by the statute of 1868, which made it his duty to institute the investigation, and did not impose, as a preliminary, any complaint. These statutes were a portion of the police regulations for the city. Their design was to protect the city against fires; both accidental and incendiary, and an officer was clothed with ample powers to accomplish the purpose, and the only thing required to call into exercise his jurisdiction was a fire within the city limits.

It is also claimed that there was a fatal variance between the indictment and the proof, in that the indictment alleges that Harris swore before the fire marshal that there were 60,000 cigars in the building at the time of the fire, whereas the proof showed that he swore that there were 65,000. This objection was in no form made at the trial, and therefore cannot avail here. If it had been made, the evidence as to that item could have been excluded or waived, or the judge could have instructed the jury to disregard the evidence, and there would still have been enough to uphold a conviction. The variance was as to one of a number of distinct items, as to which Harris was charged with swearing falsely, and if the jury had found that he swore falsely as to the other items, or as to any one of them, a verdict of guilty would have been proper. Where an indictment charges that the prisoner has stolen a number of articles, or has inflicted a number of blows, or has obtained goods by a number of false

pretenses, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense charged: 3 Russell on Crimes (4th Lond. ed.), 105; *Reg. v. Rhodes*, 2 Lord Ray., 886; 3 Starkie's Ev., 860; *Tomlinson's Case*, 4 City Hall Rec., 125; Roscoe's Cr. Ev. (6th Am. ed.), 763. We are also of opinion that the variance was not material, and could be disregarded. And, for the purpose of testing this question, we must treat the case as if the indictment contained no other charge of perjury. The strictness of the ancient rule as to variance between the proof and the indictment has been much relaxed in modern times. Variances in making his defense, and because they may expose him to the danger of being again put in jeopardy for the same offense. The variance could present no such difficulty. The indictment charged him with swearing falsely that he had 60,000 cigars in the building when, in fact, he swore that he had 65,000 there—a mistake in his favor. The falsehood did not consist so much in swearing to the precise number, for as to that he could be innocently mistaken, and preciseness was not important, but it consisted in swearing to a much larger number than he had. If the indictment had charged him with swearing falsely that there were 65,000, and he had proved that he actually had in his building 60,000, his oath would, considering the purpose for which and the circumstances under which it was given, have been regarded as substantially true, and the variance immaterial: *People v. Warner*, 5 Wend., 271.

There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the second charging perjury in swearing to an affidavit before the same officer, containing in substance the same matters testified to orally. The jury found the prisoner not guilty under the first count, and guilty under the second count. It is now claimed that the verdict was repugnant, inconsistent and void; that the prisoner could not be innocent under the first count and guilty under the second. The facts do not warrant the claim made. The two counts were not alike. The first was for oral false swearing, and the second was for false swearing in the affidavit. The fire marshal was not present when the oral evidence was all given. The material facts of the oral evidence may have been taken by his assistant in his absence; and hence the jury may have well found that, as to the oral evidence, the false swearing

charged did not take place before the fire marshal, and hence that the prisoner was not guilty as to that; and hence there is no repugnancy or inconsistency in the verdict of guilty under the second count based upon the affidavit.

Having thus carefully considered all the objections to which our attention has been called, we have reached the conclusion that the conviction must be affirmed.

All concur.

Judgment affirmed.

DANIEL v. THE STATE OF GEORGIA.

(56 Ga., 653.)

PRACTICE: *Separation of jury.*

That a juror, after being charged with a criminal case, was allowed to separate from the jury, is ground of new trial, unless it be affirmatively shown that he had no communication with any one upon the subject of the trial, either directly, by conversation, or indirectly, by overhearing the observations of others.

WARNER, CH. J. The defendant was indicted for the offense of murder, and on the trial therefor the jury returned a verdict of guilty, with a recommendation to the mercy of the court. A motion was made by the defendant for a new trial, on the several grounds therein set forth, which was overruled by the court, and the defendant excepted. It appears, from the evidence in the record, that the defendant went to a house where the deceased was (not his own house), and asked him "what lies he had been telling on him;" deceased replied, "Go away, Josh, I don't care if you never speak to me again." They continued talking, giving each other the lie, when deceased said he would not quarrel with him, but was going to attend to his own business, and went out of the house; defendant followed him, and picked up a piece of an old stump laying near the door, about three feet long; deceased went to the edge of the yard, and picked up an ax lying there, the ax resting on the ground; in that position they continued giving each other the lie, when deceased said, "I ain't telling no lie;" defendant told him if he said that again he would kill him, appeared to get mad, jumped at deceased and wrung the ax out of his hands, and told him,

God damn him, he would kill him, and struck him on the head with the ax, which blow killed him, breaking his skull; struck but the one blow.

One of the grounds of the motion for a new trial is, that one of the jurors, after being charged with the case, was allowed to separate from the jury without being accompanied by any officer, and to go across the street to the store-house of Jones, in the town of Warrenton, one hundred yards from the court-house, and return; that there was a crowd of persons there through which the juror was obliged to pass, and did pass, in going to and returning from said store-house. The fact of the separation of the juror, as alleged, is not denied, but he states in his affidavit that he went to the store-house to get his overcoat; that he did not speak to any one, and that no one spoke to him about said case; but the juror fails to state in his affidavit that he did not hear any person or persons, in the crowd through which he passed, speaking or expressing their opinions about the case. One of the reasons why the law requires jurors to be kept together, separate from the crowd of people who may have heard the trial, as well as others, is, that they may not be influenced in rendering their verdict by the expression of the opinion of others, or by popular clamor. When the law was violated by the misconduct of the juror, the legal presumption was that the defendant was injured, and it was incumbent on the state to have rebutted that legal presumption, not only by evidence that the juror did not speak to any one himself, nor did any one speak to him about the case, but that he did not hear any one in the crowd through which he passed, express any opinion in relation to the case. Jurors are as liable, in our day, to be influenced and controlled by public opinion as Pilate was in his day, when, by the clamor of the multitude, he consented to deliver up our Saviour to be crucified. The policy of the law is to protect jurors from all such influences and temptations, in the trial of criminal cases, as well as defendants who may be injured thereby.

In view of the misconduct of the juror Ricketson, and other irregularities complained of at the trial, we reverse the judgment of the court below, and order a new trial.

Judgment reversed.

STATE v. BROWN.

(15 Kas., 400.)

PRACTICE: *Impartial jury.*

On a trial for homicide, a juror who had formed or expressed an opinion that the deceased was killed by the prisoner, nothing else appearing, is incompetent to sit as a juror, and, on a challenge for cause, should be rejected. Where the court has improperly overruled a challenge for cause, the error is ground for reversal, notwithstanding the juror is afterwards challenged peremptorily by the defendant, if the defendant exhausts his peremptory challenges, because the defendant has thereby been deprived of his right to peremptorily challenge one of the jurors who sat upon the trial.

VALENTINE, J. The defendant, Harvey Brown, was charged with killing and murdering one William H. Phillips. The charge was murder in the first degree. The defendant was tried and found guilty of murder in the second degree. After he was sentenced he brought the case to this court on appeal. Several errors are assigned, but it will not be necessary to consider many of them. Among other assignments of error, the defendant claims that the court below erred in impaneling the jury. The record shows that, "upon the examination of said jurors, touching their competency to serve as jurors in said cause, L. S. Howe, one of said jurors, answered, in response to the question whether he had formed or expressed an opinion upon any material fact in the case, that he had formed the opinion that Phillips, the deceased, was killed, and that Brown, the defendant, killed him." And, again, "the question was asked said juror, in the following manner and form: 'Have you formed or expressed an opinion that Phillips, the deceased, was killed, and that Brown, the prisoner, killed him? and the said juror answered that he had so formed an opinion.' Said juror was then challenged for cause, but the court overruled the challenge. Afterward, however, the defendant challenged said juror peremptorily, and he was discharged on the peremptory challenge. The defendant exhausted all his peremptory challenges.

The foregoing is all that the record shows concerning said juror. Section ten of the bill of rights of the constitution, provides that a defendant in a criminal action shall have the right to be tried "by an impartial jury;" and, section 205 of the

Criminal Code (Gen. Stat., 853), provides that "it shall be a good cause of challenge to a juror that he has formed or expressed an opinion on the issue, or any material fact to be tried." We think the court below erred. The question, whether the defendant killed Phillips, was a "material fact to be tried." It was, indeed, one of the principal facts in this case. The question of the competency of jurors, as involved in this case, differs widely from the question concerning the same subject, decided in the case of *The State v. Medlicott*, 9 Kas., 257. There is nothing in this case that tends to show that the opinion of the juror amounted only to an impression, slight or otherwise. There is nothing that tends to show that the opinion was founded merely upon newspaper articles or rumor. And there is nothing which tends to show that the opinion was hypothetical, conditional, indefinite or uncertain. It would seem, from the record, that the opinion was in fact an opinion, and that it was definite and absolute. We have no disposition to disturb in the least the rule enunciated by the court in the *Medlicott* case. But this case differs so materially from that case, that while this court held that there was no error in impaneling the jury in that case, we must hold that there was error in impaneling the jury in this case. And, as the defendant exhausted all his peremptory challenges, we must hold that the error was material, although said juror was finally discharged by the court on one of the defendant's peremptory challenges.

The judgment of the court below is reversed and cause remanded for a new trial.

All the justices concurring.

CARROLL V. STATE.

(5 Neb., 31.)

PRACTICE: *Impartial juror — Co-respondent as witness for the state — View should be in presence of prisoner.*

The mere fact that a juror swears that he thinks the evidence might remove the opinion he has formed in answer to a question whether he could render an impartial verdict, does not make him a competent juror. He must swear unequivocally and positively, and the court must be able to determine him to be competent. On the facts of this case, a juror who was received was held to be clearly incompetent. (See note to *Erwin v. State*, ante, 262.)

Where two jointly indicted are awarded separate trials, either is a competent witness for the state against the other, before he has been convicted or acquitted, and it is not necessary to enter a *nolle prosequi* to render him competent.

Where the jury are taken by order of the court to view the locality of the crime, the prisoner has a right to accompany them, and should be taken with them, unless he chooses to waive his privilege. (See *Benton v. State*, 30 Ark., 328, to the same effect.)

MAXWELL, J. I. The first error assigned is, that the court erred in overruling the prisoner's challenge to the juror, L. J. Holland. This juror on his *voir dire* testified as follows:

Q. You say you have heard the matter talked of on the streets, and around through the country?

A. No, sir; I heard it from my neighbors, mostly.

Q. Did you read the reports of it as published in the Nebraska *City Press* and *News*?

A. Yes, sir.

Q. You read the evidence then?

A. Yes, sir.

Q. From what you have heard and read in these papers, have you formed an opinion as to the guilt or innocence of these parties?

A. To a certain extent, I think I did.

Q. From the opinion that you have formed from what you have heard and read in the papers, you might possibly lean a little one way or the other?

A. I don't think that I would.

Q. If you did not hear any other testimony than what you have read and heard, do you think your opinion would be changed any?

A. I don't think it would.

Q. Do you think that opinion you have formed would prevent you from rendering a fair and impartial verdict after hearing the law and the evidence?

A. I think the evidence might remove it.

Whereupon the prisoner's counsel challenged the juror for cause, which the court overruled, to which the prisoner by his counsel excepted.

Section four hundred and sixty-eight of the Criminal Code provides that, "if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the

ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." This court, in construing this section of the statute in the case of *Curry v. The State*, 4 Neb., 548, say: "Before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his opinion was formed solely in the manner stated in this proviso, but, in addition to this, the juror must swear unequivocally that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence." In *Palmer v. People*, 4 Neb., 75, it is held that the "word 'opinion' in this connection is frequently used to denote a mere impression, and appears to have been so used in section 468 of the Criminal Code, above quoted. It is the right of a party accused of crime to be tried by a fair, unbiased jury, so that their minds may be open to those impressions which the testimony and the law of the case ought to make." Our constitution guaranties every one charged with crime a speedy trial before a fair and impartial jury. In *Curry v. The State*, *supra*, 551, the court say: "How would it be possible to reach the conclusion that a juror, who, without any qualification whatever, declares that he has a fixed and abiding conviction of the prisoner's guilt which would require evidence to remove, can be fair and impartial between the state and the accused? Would it not rather be an abuse of judicial discretion to so hold? It is very clear that a panel composed of such jurors would fall far short of fulfilling the legal requirement of a fair and impartial jury, to which an accused person is entitled."

In the case at bar, the juror Holland was clearly incompetent to sit as a juror in the case, and for this reason the judgment of the district court must be reversed.

II. Frank McElroy was a competent witness in this case. In *Brown v. The State*, 18 Ohio State, 509, the court say: "The next question is: Was Ketchum a competent witness for the

state, standing as he did jointly indicted with Brown? The authorities already cited answer this question in the affirmative. Where separate trials are awarded to parties jointly indicted, each is a competent witness for the state, upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment. The objection goes to his credit, and *not to his competency*. This has been the settled law of the state for years; and surely the present is no time to change it, when the manifest tendency of our legislation is to narrow, instead of enlarging, the grounds of objection to the competency of witnesses."

III. Our statute provides that, "whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact may have occurred, it may order them to be conducted in a body, under the charge of the sheriff, to the place, which shall be shown to them by some person appointed by the court." This should be done in the presence of the prisoner, unless he decline the privilege, as he is entitled to have all the evidence received by the jury taken in his presence.

We see no error in the instructions of which the prisoner can complain. The judgment of the district court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

STATE v. HORNEMAN.

(16 Kas., 452.)

PRACTICE: *Former jeopardy — Appeal only lies after final judgment.*

An appeal cannot be taken from an interlocutory judgment sustaining a demurrer to a plea of former acquittal. Appeal only lies after a trial upon the merits and final judgment.

To an indictment for shooting with intent to kill a human being, the respondent pleaded former acquittal. It appeared, from the plea, that he had been formerly prosecuted for maliciously shooting and wounding a horse, on which charge he had been acquitted, and the plea alleged the identity of the two offenses. *Held*, that a demurrer to this plea was properly sustained. The two offenses are essentially different, and could not be legally identical, although both offenses might have been committed in one and the same transaction. See note to *State v. Sly*, *ante*, p. 53.

BREWER, J. Appellant was indicted for the crime of shooting with intent to kill. To this indictment he pleaded *autrefois acquit*. A demurrer to this plea was sustained, and without waiting until after a trial on the merits, defendant has appealed to this court from the ruling sustaining the demurrer. Doubtless the appeal is premature, and the case not properly before us. No judgment has yet been rendered, and appeals in criminal cases are only from judgments (Gen. Stat., p. 865, sec. 281; *The State v. Freeland*, 16 Kas., 9).

But waiving this, we think the ruling of the district court was correct. The plea disclosed a prosecution against appellant for maliciously shooting and wounding a horse, not the property nor in the possession of the party upon whom the assault with intent to kill is charged to have been made, and alleged that the shooting charged in the two prosecutions was one and the same shooting. Does this disclose an acquittal of the offense of which he is now charged? We think not. The two offenses are entirely distinct. One is not included in the other—is not a lesser degree of the other. The character of the testimony must be different in each. One fact, that is, "shooting," may be necessary for conviction under either charge. But something more is necessary in each, than the mere fact of shooting. The rule is thus stated by Wharton in his Criminal Law (1 Wharton, 7th ed., sec. 565): "It may be generally said, that the fact that the two offenses form part of the same transaction, is no defense when the defendant could not have been convicted at the first trial, on the indictment then pending, of the offense charged in the second indictment." And again: "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise." It was said by Lord Denman, in *Regina v. Button*, 11 Ad. and Ellis, new series, 946, "The same act may be part of several offenses. The same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are charges of felonies; neither ought to be, when the one charge is of felony, and the other of misdemeanor." In 1 Russell on Crimes, it is laid down, that "The acquittal on one indictment, in order to be a good defense to a subsequent indictment, must be an acquittal of the same identical offense charged in the first indictment." In the case of

the *Commonwealth v. Harrison*, 11 Gray, 308, a party who had been tried for selling liquors without license was convicted of the offense of keeping his saloon open on Sunday, although the sale of the liquor was part of the evidence to sustain the latter charge. In *Commonwealth v. Bakeman*, 105 Mass., 53, the defendant had been acquitted under a charge of willfully obstructing the engines and carriages of the C. railroad company, by placing an iron rail across the track, and was subsequently convicted, upon a charge, under a different section of the statute, of willfully putting a rail across the track with intent to obstruct the engines and carriages of the same company, and the conviction was sustained, although the same act was referred to in the two charges. The court uses this language: "It may well be that both indictments refer to the same transaction; but that fact is not decisive as to the legal identity of the two offenses. The test as to the legal identity of the two offenses is to be found in the answer to this question: Could the prisoner, upon any evidence that might have been produced, have been convicted upon the first indictment of the offense that is charged in the second?" See also *Commonwealth v. Roby*, 12 Pick., 496, in which it was held that a conviction of an assault with intent to murder, could not be pleaded in bar to an indictment for murder. In *Price v. The State*, 19 Ohio, 423, the rule is stated as taken from Archbold's Cr. Pleading, and also from Roscoe's Cr. Ev., that "the true test by which the question, whether such a plea is a sufficient bar in any case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first."

These authorities are decisive of the question, and the ruling of the district court was correct.

The appeal will be dismissed.

All the justices concurring.

JOHNSON V. STATE.

(29 Ark., 31.)

PRACTICE: *Former jeopardy—Defective plea of autrefois acquit aided by the record.*

Where a person indicted for murder is found guilty of murder in the second degree, this verdict is in legal effect an acquittal of the charge of murder in the first degree. If he is granted a new trial he cannot, on the second trial, be convicted of murder in the first degree.

The constitutional provision that defendant shall not be twice put in jeopardy for the same offense, does not operate to prevent a new trial of a charge on which the defendant has been once convicted, after a new trial has been granted on his own motion.

Where a plea of former acquittal is defective in form, the plea may be aided by the record, and should be sustained if the record of the court in the same case contains everything necessary to sustain it.

ENGLISH, C. J. Alexander Johnson, the appellant, was indicted for murder in the Clark circuit court. There was but one count in the indictment, charging him with murder in the first degree. He was tried on the plea of not guilty, and the jury returned a verdict of murder in the second degree, and fixed his punishment at imprisonment in the penitentiary for twenty-one years. He filed a motion for a new trial, on the ground that the officer in charge of the jury permitted them to separate, etc. The motion was sustained and a new trial granted by the court. He was again tried at the next term, the jury found him guilty of murder in the first degree, a motion for a new trial was overruled, and he was sentenced to be hanged on the 27th of March, 1874, but the sentence was suspended by the allowance of an appeal by one of the judges of this court.

1. Before appellant was put on his second trial, he filed a plea in bar of the whole indictment, averring the former trial on the indictment, the verdict of guilty of murder in the second degree, the granting of a new trial, and that he had once before been in jeopardy for the offense charged in the indictment, and praying to be discharged. The court, of its own motion, overruled this plea.

It is very well settled that, where a defendant is tried and convicted of a criminal offense, and a new trial is granted him on his own motion, he may be tried again for the same offense.

It is true that, by a constitutional provision as well as by the

common law, no man can be twice put in jeopardy of life or limb for the same offense; but where the first jeopardy has resulted in his conviction, it is rather a merciful interposition of the court, than any invasion of his rights, to set aside the conviction upon his own application, in order to afford him the opportunity of another trial: *Stewart v. The State*, 13 Ark., 747.

Whether the appellant could be put on second trial for murder in the first degree, after, by the first verdict, he had been impliedly acquitted of that grave offense, we shall presently see. But that he could be tried again for murder in the second degree, of which he had been convicted, and a new trial granted at his own request, and for his own benefit, there is no doubt. The bill of exceptions states that the court, of its own motion, overruled the plea. This is not the usual mode of disposing of a bad plea. It would have been more regular to dispose of it on demurrer: *Sanger v. State Bank*, 14 Ark., 412. But a technical irregularity in getting rid of a bad plea is no cause of reversal. If the court had merely disregarded the plea, and made no disposition of it whatever, the judgment would not be reversed and the cause remanded, merely to get rid of a bad plea: *Brearly v. Perry*, 23 Ark., 172.

II. The appellant, before he was put on his second trial, and after the plea of once in jeopardy was overruled, filed the following plea of former acquittal:

"The defendant pleads that he has been acquitted of the offense of murder in the first degree, as alleged in the bill of indictment, by the judgment of the Clark circuit court, entered on the 30th day of October, 1873."

To this plea the state demurred, on the following grounds:

1. The plea does not show how, or in what manner the defendant has been put in jeopardy of his life.

2. It does not set out the record of the former indictment.

3. It does not propose to verify the same by the record.

4. It is for other reasons insufficient in law.

The court sustained the demurrer. This plea was a loose attempt to set up the implied acquittal of the appellant of the charge of murder in the first degree, by the verdict of guilty of murder in the second degree, rendered in the first trial of the cause. The plea, however, substantially follows the form prescribed by the code, for the record entry of such pleas (Gantt's Dig., sec. 1851), and was aided by the record of all the previous

steps which had been taken in the cause, which was before the court.

The defense attempted to be set up by the plea was a matter of record in the cause which the court was proceeding to try, and the court was cognizant of all its proceedings in the premises: *Atkins v. The State*, 16 Ark., 574. The court sustained the demurrer to the plea, not, perhaps, because of its want of form, but for the reason that, in its judgment, the matter of defense intended to be interposed by the plea was no bar to the second trial for murder in the first degree, for the court afterwards, in its charge to the jury, told them, in effect, that the appellant might be convicted of murder in the first degree, and refused to instruct to the contrary at the instance of the appellant. The record of the former implied acquittal of the appellant of murder in the first degree being before the court, in the very cause which it was trying a second time, it was the duty of the court to tell the jury that they could not find him guilty of that grade of offense, if such be the law, even if the appellant had not interposed a plea of former acquittal: *Atkins v. The State*, *supra*.

And this, for the first time, brings this question fairly before this court: Where a person indicted for murder in the first degree is convicted of murder in the second degree, and obtains a new trial, can he be tried a second time for the higher grade of offense?

There are two grades of murder under our statutes; murder in the first degree, which is defined, and punishable by death, and murder in the second degree, punishable by imprisonment in the penitentiary for not less than five and not more than twenty-one years: Gantt's Dig., secs., 1253-4, 1262-3. In all cases of murder, on conviction, the jury are required to find by their verdict whether the accused is guilty of murder in the first or second degree: *Id.*, sec. 1957. There are also two grades of manslaughter which are defined by the statute: voluntary, punishable by imprisonment in the penitentiary for not less than two, nor more than seven years, and involuntary, punishable by like imprisonment for a period not exceeding twelve months: *Id.*, sec., 1264 to 1378. Upon an indictment for an offense consisting of several degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged

in the indictment: *Id.*, 1961. The appellant being indicted for murder in the first degree, could have been convicted of any degree of homicide warranted by the evidence: *Id.*, 1962. By the verdict of the jury, rendered on the first trial, he was convicted of murder in the second degree, and impliedly acquitted of the higher grade of offense, murder in the first degree. If this verdict had not been set aside, on his motion, he certainly never could have been tried again for the higher offense. Did the granting of a new trial, at his request, subject him to be tried again for murder in the first degree, of which he had, on legal effect, been acquitted by the first verdict?

A clause in the ninth section of the bill of rights of the constitution of 1868, declares that "no person, after having been once acquitted by a jury for the same offense, shall be again put in jeopardy of life or liberty."

This is equivalent to the twelfth section of the bill of rights of the constitution of 1836, which declares: "That no person shall, for the same offense, be twice put in jeopardy of life or limb."

A similar provision exists in the constitution of the United States, and in the constitutions of most of the states. But this rule, says Mr. Greenleaf, has a deeper foundation than mere positive enactment, it being, as Mr. Justice Story remarked, imbedded in the very elements of the common law, and uniformly construed to present an insuperable barrier to a second prosecution, where there has been a verdict of acquittal or conviction, regularly had, upon a sufficient indictment: 3 Greenl. Ev., p. 34, sec. 35.

In *The State v. Norvill*, 2 Yerger, 24, the defendant was indicted for murder, and was found not guilty of murder, but guilty of manslaughter. This verdict, though no judgment was entered upon it, was held to be a bar to a second indictment for murder, the first indictment being good, and the judgment upon it improperly arrested.

In *Campbell v. The State*, 9 Yerger, 333, the indictment contained three counts for larceny. The jury found the defendant not guilty as charged in the first and third counts, but guilty as charged in the second count. He moved for a new trial, and the court set aside the whole verdict, and ordered him to be tried a second time on the whole indictment, and he was found guilty on the third count, and a motion in arrest of judgment was over-

ruled. The Supreme Court reversed the judgment, and ordered the accused discharged, on the ground that the first verdict of acquittal on the third count was a bar to a second trial on the same count.

In *Slaughter v. The State*, 6 Humph., 412, the accused was indicted for murder, and the jury found him not guilty of murder, but guilty of voluntary manslaughter. On his motion, a new trial was granted, and it was held that he could not be put upon a second trial for murder, and that the court should have so instructed the jury.

In *Hurt v. The State*, 25 Miss., 378, the accused was indicted for murder, and the jury found him guilty of manslaughter in the third degree. A new trial was refused, and, on error, the judgment was reversed, and the prisoner discharged, on the ground that a second indictment for manslaughter (the first being bad) was barred by limitation, and that the verdict of manslaughter, on the first indictment, was an acquittal of the charge of murder, and that he could not be tried again for that offense. The court said: "A verdict of a jury finding a party, put upon his trial for murder, guilty of manslaughter in the third degree, must, of necessity, operate as an acquittal of every crime of a higher grade of which he might have been convicted under the indictment upon which the issue was made; otherwise the party, after undergoing the sentence of manslaughter, might be put upon his trial for the charge of murder, which would then be only postponed, and decided by the verdict of manslaughter. The jury, in such case, render two verdicts—one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime."

The court further said: "But it is said that such verdict only operates as an acquittal while it is permitted to stand as part of the action of the court below, and as it has been set aside by this court upon the prisoner's own application, the cause must be treated in all respects as if no trial had taken place. In support of this position, authorities have been cited holding, that when the judgment upon a trial for murder is arrested, the party may be remanded and again indicted for the same offense. The

authorities, doubtless, announce the law correctly, but they have no application to the question under consideration. The judgment is only arrested, in any case, where the verdict is against the party. He would certainly never move, neither would the court, for a moment, entertain such motion in arrest of judgment, when the verdict was in his favor. Here the verdict of the jury acquitted the party of the crime expressly charged in the indictment, and, at the same time, exempted him from the penalty of the law for its supposed commission. He could not move in arrest of the judgment on this part of the verdict, because the judgment corresponding, in contemplation of law, with the verdict in this respect, must also have been one of acquittal of the charge of murder. Whether this judgment was in fact pronounced by the court, as ought to be the practice, or attached by mere operation of law to the verdict, it was bound to be in the party's favor, and it could not, therefore, be arrested or set aside on his motion."

In *Brennan et al. v. The People*, 15 Ill., 512, a number of persons were indicted for murder. Four of them were tried on the plea of not guilty, and the jury found three of them guilty of murder, and the fourth, Ryan, guilty of manslaughter only. The defendants moved for a new trial, which was granted. They were tried again, and all of them found guilty of murder, and the case was taken, by writ of error, to the Supreme Court of Illinois. After deciding other questions in the case, the court said:

"Was the prisoner Ryan properly put upon his trial, a second time, for the murder of Story? An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment the jury may find the prisoner guilty of manslaughter. And such a finding amounts to an acquittal of the charge of murder. The finding of the inferior is necessarily a discharge of the superior offense. Ryan was regularly put upon his trial on the indictment, and was found guilty of manslaughter. In contemplation of law, the jury rendered two verdicts as to him—one acquitting him of the murder of Story, and the other convicting him of the manslaughter of Story. He was thus legally tried for the offense of murder, and acquitted. It is perfectly clear that he could not again be put in jeopardy on the same charge, unless that acquittal was set aside at his instance.

A verdict, either of acquittal or conviction, is a bar to a subsequent prosecution for the same offense, although no judgment has been entered upon it: *Mount v. The State*, 14 Ohio, 295; *The State v. Norvell*, 2 Yerger, 24; *Hurt v. The State*, 25 Miss., 378. It does not appear, from the record, that Ryan has ever waived the benefit of the verdict of acquittal. It is true that he united with the other prisoners in asking for a new trial, but the application as to him must be regarded as extending only to the charge upon which he was convicted. He had no occasion for another trial, except as to the charge of manslaughter. Being legally acquitted of the charge of murder, he surely did not desire that to be again investigated. It is not to be presumed that he would voluntarily place himself in peril upon a charge on which he had already been tried and acquitted. Even if the court, upon his motion, could open the whole case, the record does not show that such a power was either invoked or exercised. The application for a new trial did not necessarily relate to the charge upon which he was acquitted. It naturally referred to the charge on which he was convicted. Nor did the court, in terms, set aside the entire finding of the jury. It simply granted the prisoner a new trial. The order was no broader than the application. There were two distinct findings as to Ryan, and, therefore, there was not the least necessity for disturbing the one acquitting him of murder. The one might be set aside, and the other allowed to stand. The verdict was not an entire thing which should wholly stand or fall. This view gives full effect to the order of the court. There was still a charge upon which Ryan could again be tried. This view of the question is sustained by adjudicated cases," etc.

The court cited, with approval, *Campbell v. The State*, 9 Yerger, 333, and other cases, and reversed the judgment as to Ryan, and remanded the cause, with directions that he be tried again for manslaughter, and affirmed the judgment as to the other three prisoners. This case was approved and followed in *Barnett v. The People*, 54 Ill., 325.

In *Jones et al. v. The State*, 13 Texas, 168, the prisoners were indicted for murder in the first degree; they were tried on the plea of not guilty, and found guilty, by the jury, of murder in the second degree. A new trial was granted on their motion, and they were tried a second time and convicted for murder in the first degree. On appeal to the Supreme Court of Texas, the

judgment was reversed. Mr. Justice Lipscomb, who delivered the opinion of the court, after examining the authorities, said: "The result of our investigation is, that both on principle and the authority of adjudged cases, the appellants, after having been acquitted of murder in the first degree, and found guilty of murder in the second degree, could not be legally tried and convicted of murder in the first degree, and that the verdict so finding them cannot stand as the basis of a judgment and execution thereon."

In *The State v. Tweedy*, 11 Iowa, 351, the accused was indicted for murder in the second degree, and found guilty of manslaughter. The judgment was reversed on appeal, and the cause remanded for trial again. On the second trial, the court refused to instruct the jury that he had once been acquitted of murder, and could only be tried again for manslaughter. The case went again to the Supreme Court, and in a very able review of the authorities by Mr. Justice Wright, it was held that the verdict of manslaughter, on the first trial, was an acquittal of murder in the second degree, and that the prisoner could not again be put in jeopardy for that offense. The court said: "When the prisoner moved for a new trial, and appealed to this court, he sought to be relieved of a judgment against him for manslaughter. He had no complaint to make that the jury had not convicted him of the offense of murder. If, however, he might properly be subjected to a second trial for murder, then he is compelled to submit to a verdict which he may deem ever so erroneous, lest by disturbing it, when insisting on his legal rights, he may place himself again in jeopardy. When a jury has once returned a verdict of guilty as to the lower offense, the prisoner should not, in our opinion, be placed in a position of additional hazard, by attempting to be relieved of the erroneous judgment. It is settled, upon authority, that if he obtains a new trial, he may be again tried for the offense of which he was convicted. It is a very different thing, however, when it is sought to try him for an offense of which he was not convicted, and which was not, necessarily, in the verdict of guilty."

In *The State v. Ross*, 29 Mo., 32, Ross was indicted, by a single count, for murder in the first degree, tried on the plea of not guilty, and verdict of guilty of murder in the second degree. On an appeal to the Supreme Court of Missouri, the judgment was reversed, and the cause remanded for a new trial. Ross filed

a plea, setting up the former implied acquittal of murder in the first degree, as a bar to any further prosecution for that grade of offense. A demurrer was sustained to the plea, and on a second appeal, the Supreme Court held, in a well considered opinion, reviewing the authorities (Scott, J., dissenting), that the verdict of murder in the second degree was an acquittal of murder in the first degree, and that the accused could not be tried again for that grade of offense. See also, *State v. Ball*, 27 Mo., 327; 1 Bishop Cr. L., sec. 676.

In *Jordan v. The State*, 22 Ga., 558, the prisoner was indicted for murder, and the jury found him guilty of manslaughter, and the court held that the verdict was an acquittal of murder, and that a new trial could not be granted so as to subject him to a second trial for murder.

In *State v. Lepsing*, 16 Minn., 75, the indictment was for murder in the first degree, and contained a single count. On a plea of not guilty, the defendant was tried and convicted of murder in the second degree, and the court held that the verdict was equivalent to an express acquittal of murder in the first degree, and a bar to any subsequent prosecution against him for that grade of offense.

In *Gunther v. The People*, 24 N. Y., 100, the indictment contained nine counts for embezzlement, and others for larceny, and the verdict was guilty of embezzlement, which was held to be equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution. The court said: "If the jury find the prisoner guilty on one count, and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty on such counts." See also, to the same effect, *Weinzorpfli v. State*, 7 Blackf., 136.

So in *Clem v. The State*, 42 Ind., 420, held, that, if upon an indictment for murder in the first degree, the defendant is guilty of an inferior grade of homicide, without saying anything as to the higher grade, the finding is, by implication, an acquittal of the higher grade.

In *Morris v. The State*, 1 Blackf., 37, Mr. Justice Hohman incidentally assumed it to be a general rule, that he who desires a new trial, must receive it as to the whole case; and, in the *U. S. v. Harding et al.*, 1 Wall. Jr. C. C., 147, Mr. Justice Greer cautioned the prisoners, who had been acquitted of the higher and convicted of the lower offense, that if they insisted on a new

trial, he would grant it upon the whole indictment, and their lives might become, on a second trial, forfeit to the law; but whilst such expressions of these learned judges are entitled to respect, they have not been treated, in the cases which we have cited, as adjudications of the question we are considering.

Mr. Bishop says, "The waiving of a constitutional right, implied in the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict finds a prisoner guilty of part of the charge against him, and not guilty of another part, as, for example, guilty on one count of the indictment, and not guilty on another; or, there being one count, guilty of manslaughter, and not guilty of murder, and a new trial is granted him, he cannot be convicted on the second trial of the matter of which he was acquitted on the first:" 1 Bishop Cr. L., 4th ed., sec. 849.

The State v. Martin, 30 Wis., 216, is very similar in its main features to the one now before us. Martin was indicted for murder, tried upon the plea of not guilty, and found by the jury not guilty of murder, but guilty of manslaughter in the second degree. He moved the court to set aside the verdict, and grant him a new trial, on the ground that one of the jurors was not impartial. The motion was granted, and on the second trial the jury found him guilty of murder in the first degree, the court having instructed them that they might so find if the evidence warranted such a verdict. The case went before the Supreme Court of Wisconsin on questions of law which arose on the trial, and among them the one now before us. The court said: "The doctrine is well settled in this state, that courts have the power to grant a new trial after conviction, for a good cause, upon the application of the defendant, and that no principle of the constitution, or the common law, which is essential to the protection of the rights of the individual is violated thereby. The general rule is that one trial and verdict protect the defendant against any subsequent accusation, whether the verdict be for or against him, and whether the court is satisfied with the verdict or not. But a person already convicted may waive the constitutional protection against a second prosecution and ask for a new trial to relieve himself from the jeopardy he is already in. And when he does so, what ought to be considered the extent of his application? Is it to expose him-

self to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of the one of which he has been convicted? It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. It is not in accordance with the principles of human conduct for a person to ask a further trial of a charge of which he has already been found guilty by the verdict of a jury. But he seeks deliverance from one of which he has been convicted, and hence he asks that he may again be put upon trial for this charge. In this case the defendant was expressly acquitted of the charge of murder upon the first trial, and convicted of a lower crime. He asked for and obtained a new trial. A new trial for what? Of the charge of which he had been convicted, or the one of which he had been acquitted? Is it reasonable to suppose that the defendant asked for another trial in order to determine whether he had committed the crime of murder, or was it merely to determine whether he was guilty of manslaughter in the second degree, of which he stood convicted? The answer would seem to be plain, upon the principle that it was the latter charge alone that he asked to have retried, and that his application for a new trial should be held to apply to this, and not to the other crime of which he was acquitted. And this is in accordance with the great weight of judicial opinion upon this subject."

The court held that the prisoner was illegally convicted for murder on the second trial. That, on the second trial, the inquiry of the jury should have been confined to the crime of which he had been convicted on the first trial. It is our opinion, upon principle and the great current of adjudications, that the verdict of murder in the second degree, rendered by the jury on the first trial, was equivalent to an acquittal of the appellant of murder in the first degree, and a bar to a second trial for that grade of offense. There is a Code provision as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to in evidence or argument." Gantt's Dig., sec. 1972.

No doubt that the granting of a new trial upon the application of the accused, on an offense of which he is convicted, places him in the same position as if no trial had been had, but if the section of the Code above quoted meant to go further and provide that, where the indictment charges several offenses or grades of

offense, and on the first trial the accused is convicted of one offense or grade of offense, and acquitted of another, the granting of a new trial places him in the same position to the offense or grade of offense of which he was acquitted as if no trial had been had, it is in conflict with the clause of the ninth section of the bill of rights of the constitution of 1868, which declares that, "No person, after having been once acquitted by a jury for the same offense, shall be again put in jeopardy of life or liberty," and the section of the Code must be construed and administered by this paramount constitutional limitation.

There is a similar statute in Kansas, and in *The State v. McCord*, 8 Kansas, 232, the defendant was tried for murder and convicted of manslaughter, and upon his motion a new trial was granted, and the court again held that he was to be tried for murder, as if no former trial had been had. The court said that the granting of a new trial was a legislative privilege awarded the accused, and he must take it on such terms as the legislature had thought proper to prescribe. This case is reported in 1 Green. Criminal Law Reports, 406; and is disapproved in a note by the author as contrary to principle, etc.

There is also a similar statute in California, and in *The People v. Gilmore*, 4 Cal., 376, it was construed and held not to affect the constitutional protection of the accused against a second trial for an offense of which he had been acquitted. The prisoner was indicted for murder, convicted of manslaughter, and a new trial granted. The court held that, notwithstanding this statute, he could not again be put upon trial for murder.

The judgment must be reversed and the cause remanded, with instruction to the court below to grant the appellant a new trial, and that he be tried as if indicted for murder in the second degree.

ALLEN v. STATE.

(54 Ind., 461.)

PRACTICE: Constitutional rights—Waiver.

A defendant, in a criminal prosecution, cannot waive his right to a legal jury of twelve men, and a trial and conviction by less than that number, although by his consent, is illegal.

WORDEN, C. J. The appellant was indicted in the court below for the larceny of four chickens, of the value of thirty cents each.

He was put upon trial before a jury, but during the progress of the cause two of the jurors were discharged by the consent of the defendant, and the remaining ten jurors returned a verdict of guilty, assessing the defendant's punishment at a fine of five dollars, eighteen months' imprisonment in the state prison, and disfranchisement for the period of five years.

Judgment was rendered on the verdict. This judgment can not be maintained. The trial of a criminal cause, by a jury consisting of a less number than twelve, is unauthorized by law, and the verdict in such case is void: *Brown v. The State*, 16 Ind., 496. See, also, *Hill v. The People*, 16 Mich., 351.

The judgment is reversed, and the cause remanded for further proceedings.

The clerk will give the proper notice for the return of the prisoner.

UNITED STATES V. SACRAMENTO.

(2 Mont. Ter., 239.)

PRACTICE: *Waiver of right to be confronted with witnesses — Affidavit for continuance read in evidence.*

A person indicted for unlawfully selling liquor to an Indian, which is a misdemeanor, demanded an immediate trial. The district attorney moved for a continuance, on an affidavit that he expected to prove all the material facts of the indictment by two witnesses whose attendance he could not now procure. Counsel for respondent offered to admit that the witnesses, if present, would testify as set forth in the affidavit. The court, upon this admission being made, refused a continuance, and proceeded with the case. *Held*, the defendant could, and did, in this case, waive his constitutional right to be confronted with the witness, and that the affidavit for a continuance was properly admitted in evidence against the defendant.

LEWIS, J. At the November term of the district court, A. D. 1874, sitting as a court for the trial of causes arising under the constitution and laws of the United States, the appellant was indicted for a violation of an act of the congress of the United States, passed March 15th, 1864, amending an act regulating

trade and intercourse with the Indians, passed June 30, 1834, whereby it is provided that, if any person shall sell, exchange, give, barter or dispose of any spirituous liquors or wine to any Indian, under the charge of any Indian agent appointed by the United States, or shall introduce, or attempt to introduce, any spirituous liquors or wine into the Indian country, such person, on conviction thereof, etc., shall be imprisoned, etc.: 13 U. S. Stat., 29.

The indictment charges, in substance, that on the 22d day of September, 1874, the appellant did unlawfully dispose of one gill of spirituous liquors, to wit, whisky, to one John Doe, an Indian, whose real name was unknown to the grand jury; said Indian being then under the charge of the Indian agent for the Blackfeet and other neighboring tribes of Indians within the territory of Montana.

To this indictment the appellant, upon being arraigned, pleaded not guilty, and demanded an immediate trial. The United States attorney then moved the court, upon affidavit, for a continuance of the trial until the next succeeding term of the court. The affidavit set forth that one Strangle Wolf and one Mary Kite were material witnesses for the prosecution, and without their testimony he could not safely proceed to trial; that he expected to prove by said witnesses all the facts charged in the indictment; that said witnesses were present and saw the appellant dispose of said spirituous liquors to said John Doe, as alleged in said indictment; and averred his inability to procure said witnesses at said term, assigning a good cause therefor.

The defendant's attorney, in open court, then offered to admit that the witnesses named in said affidavit would, if present in court, testify to the facts set forth in said affidavit, whereupon the court refused to continue the case, and a jury was duly impaneled to try the cause.

Upon the trial the prosecution offered to read in evidence, to the jury, the said affidavit for a continuance, to which the appellant by his counsel, objected. The objection was overruled by the court, and said affidavit was read to the jury, and appellant then excepted. This is all the evidence which is set out in the record. The appellant was convicted and sentenced to the penitentiary.

After the judgment and sentence by the court, the appellant, by his counsel, moved the court for a new trial, assigning as the

grounds therefor the ruling of the court in permitting the introduction, to the jury, of said affidavit for a continuance. The court overruled the motion, and the appellant excepted. Upon this record and state of facts, the appellant asks this court to reverse said judgment and sentence. The introduction of said affidavit to the jury is the error which is assigned. This raises the question, whether a defendant, indicted for a misdemeanor, which is the case at bar, can waive the right guarantied by the sixth article of the amendment to the constitution, which provides that a defendant, in all criminal prosecutions, shall enjoy the right "to be confronted with the witnesses against him." Upon an examination of the authorities, we have no doubt that such waiver can be made. In the early days of the common law, when a person indicted for crime was not allowed to appear and be defended by counsel, and where the court alone was his legal adviser, it would seem that he could waive no legal right. But this has long since ceased to be the law in England, and was never recognized as the law in this country—certainly not since the adoption of the amendment to the constitution, above cited: 1 Bishop's Crim. Proc., 428, and cases there cited.

The counsel for the appellant insists that his admission, relative to the affidavit for a continuance, extended only to the belief of the affiant that the absent witnesses would testify as therein set forth. This seems to be more of a technical than a real or legal objection. The admission was, that the witnesses named in the affidavit, if present, would testify to the facts as stated in the affidavit, which, if uncontroverted, would have warranted a conviction. This must have been the admission according to the understanding of the court and counsel, or the court would have entertained the motion and continued the case. Therefore the admission was a waiver, by the appellant, of his constitutional right to be confronted by the witnesses against him.

Judgment affirmed.

CONLEY v. PEOPLE.

(80 Ill., 236.)

PRACTICE: *Continuance.*

Where the affidavit of the prisoner for a continuance shows that he was arrested on the 9th, and being immediately indicted, was brought up for trial on the 14th, and alleges that he has had no opportunity to confer with counsel; that he is innocent of the crime charged, and that he cannot at once safely proceed to trial on account of the absence from the state of a witness whose name and residence are given, and the affidavit shows what facts the prisoner expects to prove by the witness, and the court can see that those facts are material to the defense, and the affidavit further alleges that the witness is not absent through the procurement of the prisoner, that he has used all possible diligence in endeavoring to get ready for trial, and that he expected to be able to procure the attendance of the witness at the next term of court, it is error to refuse a continuance.

SCOTT, CH. J. Plaintiff in error was indicted, with others, for the crime of larceny, in obtaining money by a game called "three-card monte," from one Edward Nelson. On the trial, he was convicted, and sentenced to the penitentiary for a period of three years. Previous to the commencement of the trial, the accused entered a motion for the continuance of the cause, which motion was based on affidavit. That motion the court overruled, and its decision thereon is the only error assigned.

It appears defendant was arrested on the 9th day of June, charged with the crime mentioned in the indictment, and was immediately locked in the police station. On the next morning, he was taken before a magistrate for examination. On his application, the hearing of the cause was postponed to the 12th day of the same month. He was remanded to prison. In the mean time the present indictment was found by the grand jury of the county, which happened to be in session.

The accused states, in his affidavit, upon which his motion for a continuance was based, that he had been confined in jail from the time of his arrest, on the 9th day of June, until the morning of the 14th day of the same month, when he was brought out for trial, during which time he had no opportunity to confer with counsel to prepare for his defense, until the morning before the trial. He alleges his entire innocence of the crime with which he is charged, and shows he could not then safely proceed

to trial, on account of the absence from the state of a witness, whose name and residence he gives, by whom he expects to be able to prove facts indispensable to his defense.

On examination, we find the facts the accused expects to be able to prove by the absent witness are material to the defense; that the witness was not absent by the consent or procurement of the accused; that he had used every possible means within his power to prepare for trial, and that he expected to be able to procure the attendance of the witness at the next term of the court.

In view of the fact the accused had been so recently arrested, and no opportunity afforded him to prepare for trial, we think the affidavit shows sufficient reasons for continuing the cause, and especially as that was the first and only application that had been made. It was error in the court to overrule the motion of the accused for a continuance, for which the judgment must be reversed, and the cause remanded.

Judgment reversed.

HOWARD V. STATE.

(25 Ohio St., 399.)

PRACTICE: *Conviction of misdemeanor on indictment for felony—Erroneous charge.*

On an indictment containing one count for robbery, and one charging assault with intent to rob, the respondent may be convicted of assault and battery, or of simple assault merely, and it is error for the court to refuse so to instruct the jury, when the instruction is asked for by respondent's counsel.

This was a prosecution for robbery. The indictment contained a count for robbery, and also a count for assault with intent to commit robbery. The counsel for the defendant requested the court to charge the jury that, under the indictment, the jury might find the defendant guilty of assault and battery, or of a simple assault. The court refused to give this instruction, and instructed the jury that if they found the defendant innocent either of robbery or of assault with intent to rob, they must acquit. To this ruling an exception was reserved, and after judgment, it was assigned for error. The jury found the respondent guilty of assault with intent to rob.

REX, J. We think the court erred in refusing to charge the jury as requested, and in the instructions given. Robbery, and assault with intent to commit robbery, as defined in sections 15 and 17 of the crimes act (S. and C., 406, 407), clearly include all the elements of an assault and battery, or of an assault alone, both of which are offenses of a degree inferior to those of robbery, and of assault with intent to commit robbery; and, hence, under the provisions of section 168 of the code of criminal procedure (66 Ohio L., 312), the plaintiff in error might have been acquitted of the robbery, and of the assault with intent to commit robbery, and convicted of the inferior offense. Provisions similar to those contained in section 168 of the criminal code, exist in the statutes of England, and in many of the states of this country, and are simply the enactment into statutes of the well settled rules of the common law. The decisions, both before and since the enactment of these statutes, have been uniform, respecting the right to convict of an inferior offense, on an indictment for a superior one: *The People v. Jackson*, 3 Will., 92; 1 Arch. Cr. Pr. and Pl., 602. In *Stewart v. The State*, 5 Ohio, 241, decided in banc at the December term, 1831, the questions were, whether the court of common pleas erred in refusing to charge the jury, that under an indictment for an assault with intent to kill, they might find the defendant guilty of simple assault and battery, without any such intent, and in instructing the jury that if they found the defendant guilty at all, it must be of the whole accusation. In their decision, the court say, "That where an accusation for a crime of a higher nature includes an offense of a lower degree, the jury may acquit him of the graver offense, and return him guilty of the less atrocious," and, hence, on the ground that the court could not say that the defendant might not have been prejudiced by the instruction, the judgment was reversed. For a similar ruling, see *Heller v. The State*, 23 Ohio St., 582, decided since the adoption of the code of criminal procedure.

The plaintiff in error, in this case, may have been prejudiced by the refusal of the court to instruct the jury as requested, and by the instruction given, and, therefore, the judgment must be reversed, and the cause remanded for a new trial.

Judgment accordingly.

McILVAINE, C. J., WELCH, WHITE and GILMORE, JJ., concurred.

MEREDETH v. PEOPLE.

(84 Ill., 479.)

PRACTICE: *Absence of judge from court room during trial.*

The trial judge must occupy the bench throughout the entire trial, which includes the argument of counsel. Where it is made to appear that, for two days during the argument, the judge was not in the court room, but in another part of the building, engaged in other business, and that members of the bar presided in his place, the verdict will be set aside, although this was done by consent of the respondent's counsel, or even by his own consent. The accused cannot waive the presence of the judge during his trial.

SCOTT, J. It is not material whether the judge of the circuit court was absent from the court room, during the trial of the cause, by consent of counsel for the defense. Neither accused nor his counsel for him could consent, the judge of court, before whom the cause was being tried, might be elsewhere employed in other official duties, and the cause be presided over by members of the bar, selected for that purpose. It makes no difference that the judge was in another part of the same building. It is no less error than if he had been in another county. Where the judge is engaged in trying causes, there is the court, and he can hold no court elsewhere, by proxy, at the same time.

The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense, secured by the law of the land, of which a citizen can not be deprived. On two different days members of the bar presiding assumed to exercise judicial functions, by ordering adjournment of court.

This court has decided, in two civil cases, a member of the bar, even with consent of parties, can not exercise judicial powers under our constitution, and that to do so, where it appears in the record, is error of such gravity as will warrant a reversal of the judgment rendered: *Hoagland v. Creed*, 81 Ill., 506; *Bishop v. Nelson*, 83 Id., 495; *Cobb v. The People*, 84 Id., p. 511. The decision is not affected by the consideration that the judge was present a part of the time during the argument of the case. If he could be absent during any part of the trial, and his official duties could, during such time, be performed by a member of

the bar, on the same principle his absence during the entire trial might be justified.

Serious misconduct, it is insisted, was permitted in the presence of the jury, hurtful to the cause of defendant; but, whether that is so or not, the absence of the judge from the court room, engaged in other judicial labors, for a part of two days, in a trial of this magnitude, can not be justified on any principle, or for any cause.

It is not allowable in a trial involving only mere property interests, much less in a case where the life of a human being depends upon the issue.

Accused has had no such trial as the constitution guaranties to every person charged with crime, and hence the conviction can not be permitted to stand.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

STATE v. BYBEE.

(17 Kas., 462.)

PRACTICE: *Indictment—Coercing jury to agree.*

The indictment is sufficient, although it does not specifically allege that the crime charged was committed in the state of Kansas.

The jury ought not to be unfairly or unreasonably urged or coerced by the trial judge to an agreement. Such undue urging by the trial judge tends to produce compromise verdicts, which, in criminal trials, ought not to be tolerated. *Held*, that the language of the trial judge, in this case, tended to exert an undue influence and pressure upon the jury to reach an agreement, and probably did exert such an influence, since the jury found the defendant guilty of assault only, in a case where it was clear he should either have been convicted of assault with intent to commit murder, or wholly acquitted.

BREWER, J. Defendant was convicted of an assault in the district court of Chautauqua county, and from that conviction appeals to this court. He insists that the information is insufficient in not specifically alleging that the offense was committed within the state of Kansas. The very question has already been presented to and decided by this court, and a similar information adjudged sufficient: *The State v. Walter*, 14 Kas., 375. We

see no reason to alter the views therein expressed. The principal question, however, is presented by the following bill of exceptions :

(*Title.*) September term, 1876. Be it remembered, that after the case had been submitted to the jury, and after the jury had deliberated upon their verdict several hours, they were brought into court, and asked by the court if they had agreed upon a verdict. The jury having answered in the negative, the court addressed them in substance as follows :

"Gentlemen of the jury: I am led to infer, from the character of your communications to me, that you think it impossible to agree, and desire to be discharged. You have heard the evidence, and the case has been ably argued by counsel, and the court has afforded every facility to enable you to understand the case. The trial has been very expensive to the public, and has occupied a great deal of time and attention, and it is not possible that it will ever be more clearly presented than it has been in this its first presentation to a jury. I do not desire to try the case again. It is often considered a reflection on the court, and upon you, as jurors, should you not agree. You have been impaneled to come to an agreement, not to wrangle over pet ideas and theories. It is the duty of the jury to agree if possible. The theory of an agreement by the jury is, that twelve minds are brought as nearly together as it is possible for twelve minds to come. To bring about this result, it is necessary for the individual juror (in matters of detail, and on questions of minor importance), to defer to some extent to his fellow jurors, and to surrender some of his own ideas and opinions to what seems to be an overwhelming sentiment against him. None of us are infallible. And in your deliberations you should realize this, and mutually depend upon each other. And in the consideration of the details of the case, you should meet the questions as they arise, in a spirit of mutual concession and forbearance, and thus gradually as you proceed, step by step, to arrive at a conclusion to which you can all assent, although, if left to yourselves, you would probably come to a different conclusion. You should bring your minds together like the mixing of different ingredients by an apothecary, and ascertain what is the product. In a case of this importance, I feel it to be my duty to afford you the most ample opportunity to agree. It is not my purpose to force

you to a verdict not in accordance with your convictions. My experience with juries has taught me that they often agree after they have imagined it impossible to do so, and after the agreement they have been surprised that they ever disagreed. I hope this will be your experience. I, therefore, urge upon you to make another effort, in a spirit of reconciliation and fairness to each other, to the accused, and to the public, and if possible agree upon a verdict, and I warn you not to think of being discharged for some time to come."

To the giving of which charge or instruction, and each and every part thereof, defendant at the time duly excepted, *first*, because said instruction was not in writing [This objection was entered after the delivery of the foregoing to the court, but counsel for the defendant had no intimation that the court intended to address the jury as above, until after the address was delivered]; *second*, because said instruction, and each and every part thereof, is error in law; *third*, because the giving of such instruction, after the retirement of said jury for deliberation upon their verdict, is erroneous and unauthorized. But the court overruled such objections, and each of the same, to which the defendant at the time duly excepted, and still excepts, and asks the court to sign this his bill of exceptions, and make the same part of the record, which is done accordingly, this 15th of September, 1876.

W. P. CAMPBELL, *Judge*.

We are constrained to believe, after a careful examination of the record, that the jury were misled by this instruction, and that there ought to be a re-trial. The testimony impresses us forcibly with the conviction, that the defendant was either guilty of an offense higher than that of which he was found guilty, or guiltless of any offense. The prosecuting witness, and his wife, testified that defendant and another party came to their house in the night time, and standing within twenty feet, fired several shots into the building. The building was a log house, one story, and one room, and the chinking between the logs had dropped out, so that the cracks between the logs were open, from the width of a hand, up. Some of the bullets passed through the bed-tick upon which prosecuting witness and his wife were sleeping. There was testimony also of a previous quarrel, and ill-feeling between the parties. The defendant denied the shooting, or being present

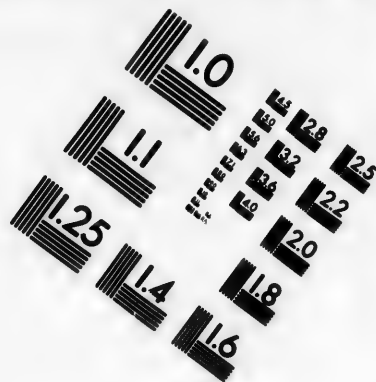
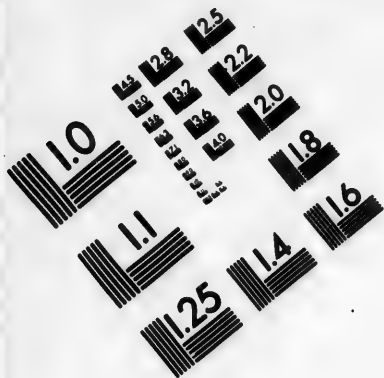
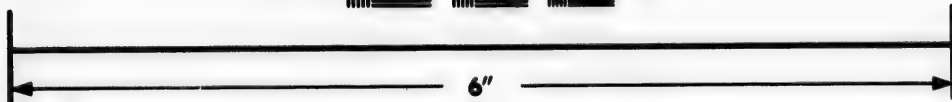
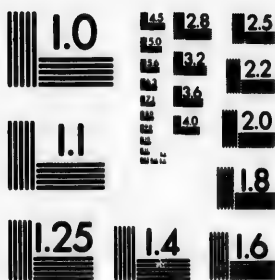


IMAGE EVALUATION TEST TARGET (MT-3)



**Photographic
Sciences
Corporation**

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 873-4303

12.5
12.2
12.0
9

10

at or near the house of the prosecuting witness that night, and testified that he was at his own house all the night. There was also corroborating testimony, but there were distinctly the two lines of evidence. Now, had the jury credited the defendant's testimony, they could not have done otherwise than acquit; and it seems to us, that, had they credited the testimony of the state, they must have found the defendant guilty of something more than a mere assault. And the punishment which the court imposed, a fine of five hundred dollars, indicates its judgment as to the aggravated character of the offense. It also appears, both from the bill of exceptions and from the other parts of the record, that the jury were for a long time unable to agree; and if we may credit some of the affidavits filed upon the motion for a new trial, were evenly divided. It seems to us, under these circumstances, that the remarks of the learned court were calculated to exert too strong a pressure upon the jury in favor of the agreement. It may not perhaps be possible to single out any particular sentence, and say that this is, strictly speaking, and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to trespass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them, and as it seems to us must have been received by the jury, is, that the jury ought, by compromise and surrender of individual convictions if necessary, to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. Now, while a court may properly call the attention of the jury to many matters which increase the desirability of agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, and, at least in cases where the matters at stake are of minor importance, the question of expense to the parties and the public, yet no juror should be influenced to a verdict by a fear of personal disgrace, or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence, or his integrity. Personal considerations should never be permitted to influence his conclusions; and the thought of them should never be presented to him as a motive for action. Nor do we think the illustration given by the learned judge a happy one. A verdict is the expression of

the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials, that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds, is the certainty of fact sought in the law. Especially is this true in criminal trials. Here should no thought of compromise be tolerated.

Before the state can fairly demand the conviction and punishment of an alleged criminal, the twelve jurors should each be led from the testimony to a clear conviction of his guilt; and where six jurors believe a defendant guilty of murder, and six believe him innocent of any offense, it is an outrage for the twelve to bring in a compromise verdict of guilty of manslaughter. We fear that something of this kind occurred in this case, and that the charge above quoted was mainly instrumental in producing this result. At any rate, it seems to us clear, that such would be the tendency of those instructions; and it is not apparent that it did not have that effect. For this error the judgment must be reversed, and the case remanded with instructions to grant a new trial.

All of the present members of this court have had experience as district judges, and know what is their solicitude for the agreement of juries, and their repugnance to see the labors of a trial prove abortive through the failure of the jury to agree. We therefore fully appreciate the considerations which induced these instructions from the learned judge, and fully sympathize with the spirit which controlled him, but are nevertheless constrained to believe that he passed beyond the line which should limit the counsels and instructions of a court to a jury, and that thereby the material rights of the defendant were prejudiced.

All the justices concurring.

WHITE V. STATE.

(52 Miss., 216.)

PRACTICE: *Impartial jury—Examination on voir dire by judge—Preliminary examination into competency of witness—Illiterate juror—Assurances to accomplice—Right of counsel to private conference with witness in custody—Credibility of accomplice—Falsus in uno, falsus in omnibus.*

A juror who stated on his examination on the *voir dire* that his impression was that the respondent was more guilty than a co-respondent whom he knew had already been convicted; that it was merely an impression, founded on no facts, and that his mind was perfectly free to act justly; that his impression did not amount to an opinion, and was not such as would in the least influence his verdict, was held competent to sit.

The trial judge may properly himself examine jurors as to their competency and on a murder trial has a right to ask the jurors if they are opposed to capital punishment.

Before a witness testifies in chief, counsel for the respondent has the right to examine her for the purpose of showing that she is not competent to testify, for want of intellectual capacity, and it is error to deny him this privilege on the ground that the judge has in another case investigated the matter and determined her to be competent.

It is not a legal objection to a juror, in the absence of any statute requiring an educational qualification, that he can neither read nor write.

Ordinarily, counsel ought to have the right to confer in private, before the trial, with the witnesses they propose to call. And where the circumstances are such that this right can be exercised only by the consent of the court, it is error to refuse it.

It is no objection to the competency of an accomplice who is called as a witness for the state that he has been assured by the judge and district attorney that so long as they remain in office his testimony shall not be used against him.

The credibility of an accomplice is a matter solely for the jury. His testimony is to be weighed with great caution, jealousy and distrust, but the jury are to judge how far his testimony has been corroborated, and they may believe him without corroboration.

The court is not bound to instruct the jury that they must wholly reject the testimony of a witness who has sworn falsely in one material particular, even though such false swearing was willful. The matter of his credibility as to other matters is for the jury.

HON. J. A. ORR, Judge. At the March term, 1876, of the circuit court of Colfax county, plaintiff in error was indicted jointly with one Margaret Givens, charged with the murder of Belle Givens, the infant child of Margaret Givens. He was tried at the same term of the court, convicted, and sentenced to

the penitentiary for life. On the trial, at the instance of the state, the court, among other instructions, gave the following :

"12. It is for the jury to determine, if they find the defendant guilty of murder, whether it shall be a general verdict of guilty, as charged in the bill of indictment, in which the death penalty will be pronounced, or for the jury to find the defendant guilty, and adjudge the penalty imprisonment for life in the state penitentiary."

The court refused to give the following instructions, asked by the defendant, to wit :

"5. If the jury have a well-founded doubt as to the guilt of the defendant, they will find a verdict of not guilty." "Unless there has been the testimony of at least one credible witness introduced before the jury, that has established beyond all reasonable doubt that the defendant is guilty as charged in the indictment, the jury will find for the defendant; as no citizen should be convicted of the crime of murder upon the testimony of witnesses, without there has been the testimony of at least one credible witness introduced before the jury.

"8. Where a witness has testified falsely as to one material fact on the trial of the cause, courts and juries are bound, upon principles of law and morality and justice, to apply the maxim '*falsus in uno, falsus in omnibus*'—that is, false in one thing, false in all."

The indictment being joint, a severance was had, and the co-defendant, Margaret Givens, who had been tried and convicted, but not yet sentenced, was summoned as a witness for White, the accused, and brought into court, and the circuit judge refused to allow counsel for the prisoner to have any conversation with the witness. To which defendant excepted. When Matilda Givens was offered as a witness, defendant's counsel proposed to examine her touching her competency, intellectually, as a witness, which was refused upon the ground that the court had, on a former trial in another case, examined the witness and pronounced her competent to testify. To this defendant excepted. After conviction a motion was made for a new trial, refused by the court, and this cause came to this court on writ of error.

Defendant assigns for error, in substance, the following :

1. That the court erred in refusing to permit counsel for accused to have any conversation with the witness and co-defendant, Margaret Givens.

2. In interrogating the jurors before challenge, and especially for asking each juror if he was opposed to capital punishment.

3. In overruling challenge, for cause, of William Henry, as not an impartial juror.

4. In overruling challenge of juror James Brinker, as incompetent, because he could neither read nor write.

5. In overruling motion to examine the witness, Matilda Givens, touching her competency to testify.

6. In permitting the witness, Matilda Givens, to testify as to the conduct of the co-defendant, Margaret Givens, towards her mother.

7. In permitting Margaret Givens to testify in the cause.

8. In modifying defendant's charges, Nos. 1, 4 and 6.

9. In refusing defendant's charges, Nos. 3, 5, 7 and 8.

10. In giving the state's charges, Nos. 5, 6, 7, 8, 9, 10, 11 and 12.

11. In overruling motion for a new trial.

Fred Beall, for plaintiff in error.

The action of the court, in refusing counsel the right to confer with his witness, is without a parallel.

The court had no authority to interrogate the jurors before challenge, and, in the next place, the questions asked were improper: 1 Ch. Crim. L., 546; *King v. The State*, 5 How., 730.

That William Henry was not a competent juror. See *Sam's Case*, 13 S. and M., 189; *Helm's Case*, *Ib.*, 500; *Williams's Case*, 32 Miss., 389; *Noe's Case*, 4 How., 330.

James Brinker was incompetent as a juror. He could neither read nor write, and the Code of 1871, sec. 643, requires all instructions to be in writing. Construe this with sec. 724.

It was error to refuse to examine Matilda Givens as to her competency as a witness. See Ph. Ev., 19.

It was error to permit the witness, Matilda Givens, mother of Margaret, to state the conduct of Margaret toward her, after her intimacy with the accused. This question was incompetent, and could only prejudice the jury.

Margaret Givens was incompetent as a witness, because of inducements offered her to testify. The action of the court, in modifying defendant's instructions, is not sustained by the Code, sec. 643.

Defendant's third charge should have been given: 1 Ph. Ev., 108-114; *Rey v. The State*, 1 Iowa, 316.

Defendant's fifth charge should have been given. It is the law. It was short and comprehensive.

The eighth should have been given. See *Nevell v. Wright*, 8 Conn., 323; 6 Monroe, 136; 2 Wheat., 457.

A new trial should have been granted.

The verdict is not warranted by the testimony in the case, and the ruling of the court, on the points of law, was unsupported by authority, as already shown.

G. E. Harris, Attorney-General, for the state.

As to the interview of the counsel with the co-defendant, Margaret Givens, it is only necessary to say that she had been convicted of a capital offense, and was in custody of the sheriff, awaiting her sentence. The court had the right to interrogate the jurors, of its own motion (see *Carpenter's Case*, 4 How., 163), and especially in a capital case, if they are opposed to capital punishment. See *Williams's Case*, 32 Miss., 389; *Lewis's Case*, 9 S. and M., 115; *Damon's Case*, 13 Wend., 351; *Leshner's Case*, 17 Serg. and Rawle, 155; *Jones's Case*, 2 Blackf., 475; *Martin's Case*, 13 Ohio, 364; *Williams's Case*, 3 Kelly, 459.

The juror Brinker was competent.

The Code does not require that he should read and write; the qualifications are fixed by the Code of 1871, sec. 724, and nothing more can be required.

As to the right of defendant to examine, as to competency, the witness Matilda Givens, the court had gone through that examination on the previous day, and had pronounced her competent. The court has the power to modify the instructions so as to conform them to the law, in his judgment: Code 1871, sec. 643; 9 S. and M., 284; 13 *Ib.*, 202; 4 *Ib.*, 118.

As to the third instruction for the defendant, it is not the law (see *Fitzcox's Case*, MS. opinion), and the court is not bound to repeat instructions already given.

As to the motion for a new trial, the main argument is that the testimony did not warrant the verdict. I think it does, and the question for this court is, not whether the verdict is right, but, is it manifestly wrong?

SIMRALL, C. J. Henry White was jointly indicted with Margaret Givens, for the murder of Belle Givens, the infant child of

Margaret. They severed in the trial. Henry White, having been convicted as charged, prosecutes this writ of error, and makes numerous assignments of error. We will notice them in their chronological order.

Several exceptions were taken to the rulings of the court, in the organization of the petit jury. William Henry was challenged, for cause, as an incompetent juror. On his *voir dire* he stated "that he had been in the court house a short time on the morning of the commencement of Margaret Givens' trial; did not hear any of the testimony in the cause, but had been informed by the deputy sheriff that she had been convicted, and that his impression was that Henry White was more guilty than Margaret Givens; it was merely an impression, founded on no facts, and that his mind was perfectly free to act justly; that his impression did not amount to an opinion, and was not such as would in the least influence his verdict in deciding upon the testimony in the cause."

In *Logan's Case* (50 Miss., 275), an attempt was made, by an examination of the cases, to state what they settled, and it was decided from them that if the person offered as a juror is so "far prejudiced as to require testimony to annul a previous opinion, derived from whatever source or origin," he is incompetent. "If, however, the opinion is founded from rumor, and, upon investigation, shall be shown not to be fixed so as to create a bias or prejudice which it requires testimony to remove or overcome, then he is a competent juror." The increased facilities, through the press and other methods, of spreading the narratives of crime, as items of news, especially the more intelligent classes, makes it inexpedient to lay down a fixed rule which would exclude persons who form their opinions from newspapers, or common report and rumor, unless it be of that character which impairs the impartiality of the juror by engendering a bias or prejudice which is fixed, and would require testimony to remove.

The juror Henry had heard none of the testimony on the trial of Margaret Givens, or at any other time. The impression he had of the prisoner's guilt arose altogether from other sources, not from the facts—was vague and evanescent, and would not interfere with the free exercise of his judgment, and would not require testimony to remove it. We think he was a competent juror.

2. The prisoner excepted to the right of the judge to examine the members of the *venire* as to their qualifications. Among other questions, "he asked each juror if he was opposed to capital punishment, * * * to which the defendant objected, upon the ground that it was not a proper question to be propounded."

The jury is impaneled under the supervision of the court, and it is the duty of the judge to see that it is composed of impartial persons. It was said in *People v. Damon*, 13 Wend., 354, that the court may set aside incompetent jurors at any time before testimony is given. That rule was approved and acted upon in *Lewis's Case*, 9 S. & M., 118, and for the very reason complained of in the exception. Haynes, having answered "that he had formed and expressed no opinion," etc., was tendered to the prisoner as a juror, when he voluntarily stated to the court that "he had conscientious scruples about finding any man guilty of murder." The court thereupon discharged him, without challenge either on the part of the state or the accused, and that was held to be right. In *Williams' Case*, 32 Miss., 391, the jurors were first examined by the court, and turned over to the district attorney for further examination as to qualifications. The examination by the court as to competency was approved, the court quoting with approval the doctrine of 9 S. & M., 119: "In all such cases it is the duty of the court to see that an impartial jury is impaneled, composed of men above all exception." To perform that duty, the approved practice has been for the judge, in the first instance, to examine the members of the *venire*; the district attorney and the prisoner may pursue the examination so as to elicit all the facts, if they choose, and the court decides, as a question of law, whether the person is competent or not.

It was not error for the circuit judge to make the examination and propound the particular question. Nor was it error for the attorney for the state to peremptorily challenge Collins and Johnson, it not appearing that the challenges for the state had been exhausted.

3. When Matilda Givens was offered as a witness by the state, the prisoner proposed to examine her and to introduce proof to show that she was not competent to testify in a court of justice. "The court, first stating that said Matilda had been examined before him on the previous day, and being himself satisfied that she possessed sufficient intellect to render her competent,

overruled the application and refused to examine the witness," etc. It was the right of the prisoner to test the competency of the witness, either as to religious belief—whether she recognized the obligation of an oath—or as to intellectual capacity. It is answer that on another occasion and in a different legal proceeding the judge made such examination. The prisoner was a stranger to that inquiry, without opportunity to offer testimony or suggest questions. The witness may have been *compos mentis* on one day and a lunatic on another. The question is as to the competency at the time she was offered as a witness: 10 Johns., 362; *Gelbard v. Spingle*, 15 Serg. & Rawle, 235; *Evans v. Hallock*, 7 Wheat., 453. This ruling was erroneous. There is nothing in the objection to the juror Binker, that he could not read or write. That has never been enacted by statute as incompetency. The law does not define an intellectual or educational standard.

The refusal of the court to allow the counsel for the prisoner to have any conversation with Matilda Givens, she having been summoned as a witness by the defendant, and being in the court house when the trial began, is assigned for error. As part of the jury trial guaranteed by the constitution is the right to process for witnesses, and the use of the usual and ordinary means to prepare for the trial, it is usual, and often important, that the counsel should confer with the witnesses that he proposes to call. It cannot be in the power of a judge to deny to the counsel of a defendant, charged with so grave a crime as murder, conversation with his witnesses generally. That is essential to a full and complete development of his side of the case. Nor could the court deprive the prisoner of the benefit of Margaret Givens' testimony. Are there exceptional reasons, applicable to this witness, which would justify the order? The prisoner was jointly indicted with her; she had been convicted, and was awaiting the judgment of the court. It will not do to assume that the conversation in progress with the witness was for any other than a legitimate purpose. Suppose that the counsel proposed to introduce the woman to prove an isolated fact important to the defense. Would it not be proper to inquire in advance as to her knowledge? It might be, if she knew nothing of it, that another witness might be sent for. Without such conversations beforehand, the prisoner might be surprised on the trial, without means or ability then to repair it with other testimony. There may be,

perhaps, extreme cases of witnesses situated like Matilda Givens, when such interviews should be allowed only in presence of the sheriff or some officer of court (but that point does not arise here) ; but in no state of a case should the court refuse the counsel for the prisoner an opportunity to converse with the witness which he has subpoenaed, and proposes to call, on the subject of her testimony. In this there was error.

4. It was also objected that the same witness was rendered incompetent by reason of the assurances of the judge and district attorney, given to her in open court, that whatever statements she made in testimony should not be used against her so long as they respectively were in office, but further than that they would not pledge themselves. The judge also stated that he could offer her no inducement to testify ; that she would not be required to answer questions unless she was perfectly willing.

The witness could not be required to deliver inculpatory evidence, and it would present a very different question from that before us if her admissions, made under these circumstances, were resisted in a trial against herself. But, if she chose to testify against the defendant, he can not object, because the evidence criminales herself. It was a privilege personal to herself to testify or not. If she waived it, the prisoner can not interpose it to shield himself from the damaging effect of her testimony.

5. The testimony of Matilda Givens in reference to the conduct of Margaret, her daughter, towards her, was also objected to. The mother spoke of the filial behavior of her daughter, before and after association with the defendant, in connection with the great influence which the defendant had acquired over her. The case attempted to be established in evidence by the state was, that the defendant advised and persuaded Margaret to drown her infant, and was present, giving countenance and encouragement, when the act was done. It was legitimate to prove the influence of the prisoner over Margaret, and, as tending to show the degree of it, that Margaret was quite young, about fifteen years of age, and, prior to her acquaintance with the defendant, had been obedient and dutiful to her mother, but that the maternal control had been supplanted by the will and influence of the defendant, by her association with him. The testimony was properly admitted.

6. Exception is taken to the refusal of the court to grant the fifth, seventh and eighth prayers of instruction for the defendant.

It has been correctly laid down, by authority, that the court is bound to instruct the jury on all the points requested by the party pertinent to the case. The responsibility for a correct announcement of the law is upon the court. It would seem to follow, therefore, if the written requests do not, in the opinion of the judge, correctly state the law applicable to the case, that he ought to so modify them as to make them conform to the law. Nor has the defendant just ground to complain if the law is truly stated on the modification—so that it covers the points.

Nor, further, is the court under any duty to repeat instructions already given, which fully and completely cover the grounds embraced in the one asked. This observation applies to the refusal of the court to give the fifth request of the defendant. The twelfth instruction granted for the state embraces all that is in the fifth, refused to the defendant, and sets forth with fullness and completeness, the law upon the subject of doubts. The whole ground had already been covered, and it could have been of no possible prejudice to refuse to go over it again.

7. It is not easy to see clearly what proposition of law was intended to be declared in the seventh instruction. The substance is: "That, unless there has been the testimony of at least one credible witness introduced before the jury, that has established beyond all reasonable doubt that the defendant is guilty as charged, the jury will find for the defendant." The last member of it assigns the reason. If the meaning be—as the grammatical structure of the language indicates—that one credible witness must prove every fact which constitutes the crime, it is not sound. For several witnesses may prove independent facts which, together, establish the guilt, but the testimony of one or two of them may fail to prove enough. In this case the jury might be unwilling to rely upon the testimony of Margaret, a confederate and accomplice, although she proved every fact that makes up the crime, unless she was supported by other witnesses in some material particulars. The testimony of an accomplice should be weighed with great caution, jealousy and distrust, but it is impossible to say, as a question of law, that he or she shall not be believed: *Lithler's Case*, 8 S. & M., 228. In the same case the court says: "The jury are to judge how far his testimony has been corroborated, or they may believe him, if they choose, without corroboration:" *Ibid.*, *Fitzcox's Case*, MS. opinion.

The eighth prayer is too narrow, and fails to submit to the consideration of the jury all the elements that make up the rule of law on the subject. It assumes that if a witness swears falsely as to one material fact, courts and juries are bound, on the principles of law, to apply the maxim, "*falsus in uno, falsus in omnibus*"—that is, as we construe it, to disregard the testimony *in toto*.

The defect in the prayer is that it omits to tell the jury that the witness has willfully and corruptly sworn falsely as to a material fact. The false swearing must be willful. The prayer does not exclude the idea of mistake or misconception. Nor is it an absolute rule of law that the jury must reject the witness *in toto*. It throws strong suspicion over his credibility, and may warrant the jury to disbelieve him. It goes to his credibility (cases last cited). It was not error to refuse the prayer.

For the error hereinbefore indicated, the judgment is reversed.

BEALL v. STATE.

(53 Ala., 460.)

PRACTICE: *Indictment—Averment of ownership.*

An indictment for burglary, which alleges a felonious breaking and entering of "the dwelling-house of the late Jno. Tate; now, etc., * * * belonging to the estate of the late Jno. Tate," and in the second count, "the dwelling-house of the estate of the late Jno. Tate," is fatally defective in not showing whose house was broken into. John Tate being dead, the house must of necessity belong to some one else, and this, for all that appears in the indictment, may be the respondent.

BRICKELL, C. J. The indictment is for burglary, averring a breaking and entry, in the first count, "of the dwelling-house of the late Jno. Tate, said house now, and at the time of the offense committed, belonging to the estate of the late Jno. Tate;" and, in the second count, it is averred to have been "the dwelling-house of the estate of the late Jno. Tate." The common law requires that an indictment for burglary must lay, with precision, the ownership of the house in which the offense has been committed, and the proof must conform to the averment: 2 Lead. Cr. Cases, 53; 2 Bish. Cr. Pr., secs. 135-6-7-8; 2 Wheat. Am. Cr. Law, sec. 1555, *et seq.*; 1 Russ. Crimes, 806. The statutes have not abrogated or modified this rule; on the contrary, the form of

indictment prescribed contains an express averment of ownership: R. C., p. 811, form No. 35.

There is no averment of ownership in either count of this indictment. That which is intended as such an averment shows on its face that the ownership is not disclosed. If the person described as Jno. Tate is dead, and that is the intendment, and during life was the owner of the dwelling, on his death it devolved on his personal representatives, heirs or devisees. Who these are is not averred. In *Pleasant v. State*, 17 Ala., 190, the indictment described the defendant as a slave, "the property of the late William Copeland." Dargan, C. J., said: "Is the ownership of the accused sufficiently averred? The allegation is that Pleasant, a slave, 'the property of the late William Copeland.'" In the sense in which the adjective *late* is here used, it means existing not long ago, but now departed this life. This is the meaning all would give it, and no doubt is the meaning intended to be attached to it by the pleader. The accused is, therefore, alleged to be the property of one not in life. This cannot be, for the dead can own no property. Death strips us of all rights and title to property, and casts them on the living, who alone can own property. The ownership of the accused is, therefore, not alleged, and the indictment is, consequently defective." It must be observed of this case, that the ownership of the accused, nor his *status*, was an ingredient of the offense with which he was charged. The only purpose of its averment was, that in the event of conviction, it should be ascertained to whom the state must make compensation for the loss of property on his execution. The house broken and entered must not be the house of the accused, into which he had the lawful right of entry. The ownership is as essential as the ownership of goods on an indictment for larceny, or on any other indictment for an offense against property.

It is a well-known rule of criminal pleading, that when it becomes necessary to aver the ownership of property which resided in one dead, while living, if it is personal property, passing to the personal representative, of which he has custody, actually or constructively, the ownership must be laid in him. If real property, then in the heir or devisee; and it is generally sufficient to aver it in the actual possessor. An illustration, which clings to the memory of the lawyer, is given by Lord Hale: "If A, dying, be buried, and B opens the grave

in the night time and steals the winding sheet, the indictment cannot suppose them the goods of the dead man, but of the executors, administrators, or, ordinary, as the case falls out:" 2 Hale's Pleas Cr., 181. The indictment was insufficient, and the conviction erroneous. For aught that appears on the face of this indictment, the accused may have been the owner of the dwelling-house. He may have been the heir, or devisee, or the personal representative of the deceased, having its possession, and the lawful right of entry. Such a presumption is not excluded by the averments. The cases of *Anderson v. The State*, 48 Ala., 665, and *Murray & Bell v. The State, Ib.*, 675, it may be, induced the framing of the indictment in its present form. These cases cannot be supported on principle or precedent, and are introductive of a laxity in criminal pleading that ought not to be tolerated, and are consequently overruled.

The judgment is reversed and the cause remanded, but the prisoner will remain in custody until discharged by due course of law.

HOUSH v. PEOPLE.

(75 Ill., 487.)

PRACTICE: *Warrant—Escape—Officer permitting an escape not liable if his warrant is void—Defective complaint.*

If the warrant by virtue of which an officer receives a prisoner is void, because the magistrate had no jurisdiction to issue the warrant on the affidavit made before him, the officer is not liable to prosecution for voluntarily permitting the prisoner to escape out of his custody, although the warrant is regular on its face. A warrant regular on its face, although illegally issued, is a protection to the officer who has no knowledge of the illegality of its issue, but such a warrant imposes no duty upon him.

No warrant can legally be issued until a sworn complaint is made, charging that a crime has been committed, and that there is probable cause to suspect that the person charged with the crime committed it.

The affidavit on which the warrant issued in this case is held fatally defective.

SCHOLFIELD, J. Appellant was convicted, in the court below, for permitting the escape of a prisoner who had been committed to his custody in his official capacity of constable. The affidavit upon which the warrant, by virtue of which the prisoner was arrested, was issued, is as follows:

"STATE OF ILLINOIS, } ss.
KNOX COUNTY.

"The complaint and information of George Huggins, of Knox township, in said county, made before James Moore, Esq., one of the justices of the peace in and for said county, on the sixth day of May, 1873, who, being duly sworn, upon his oath says that, in Knox township, in the said county, on the 25th day of April, 1873, he had a saddle and sheep skin stolen from his barn in said place, and that he verily believes they are now in possession of a man, name unknown—a large size man, riding a sorrel mare with a light mane and tail, and young colt running after, when last seen—who stayed last night at Edmund Russell's, in Persifer township, this county. He therefore prays that the said unknown described man may be arrested and dealt with according to law.

"GEORGE HUGGINS.

"Subscribed and sworn to, before me, }
this sixth day of May, 1873.

"JAMES MOORE,

"Justice of the Peace."

The warrant recites, among other things, that complaint had been made, under oath, by the complainant, that he "had just and reasonable grounds to suspect that a certain unknown man (then follows the description given of him in the affidavit) is guilty of said theft, or larceny, of saddle and sheep skin, as he verily believes." The warrant is, in other respects, in the usual form, and no objection is taken to it, except such as is predicated on the insufficiency of the affidavit.

The warrant was placed in the hands of a constable named Thurman to execute. Thurman, after receiving the warrant, arrested a man answering to the description therein given, and subsequently delivered the warrant to appellant, and placed the prisoner in his custody.

The first and third instructions given by the court, at the instance of the people, embrace the only questions necessary to be considered, and are as follows:

"1st. The court instructs the jury that the warrant introduced in evidence in this case is a legal warrant, and will be so regarded by the jury.

"3d. The jury are instructed that, if they shall believe from the evidence, beyond a reasonable doubt, that on the sixth day of

May, A. D. 1873, the warrant introduced in evidence in this case was issued by James Moore, a justice of the peace of said Knox county, in the state of Illinois, on the complaint of George Huggins, for the arrest of the person described therein, for a criminal offense, and that said warrant was delivered to Fletcher Thurman, a constable of said Knox county, to arrest the person named therein, and that said Thurman, as such constable, and under and by virtue of said warrant, did arrest one William Hughes, and that said Hughes was the person described in said warrant; and that said Thurman afterwards delivered the said warrant, and the body of said prisoner Hughes, into the legal custody of the defendant, Jas. D. Housh, then and there a constable of said Knox county, and that said Jas. D. Housh willfully failed and neglected to bring the said prisoner before said James Moore, the officer who issued said warrant, or before any other justice of the peace, in his absence, as required by law, but voluntarily suffered and permitted said prisoner, before conviction, to escape and go at large, in manner and form as charged in the indictment, then the jury, if true to their oaths, must find the defendant guilty."

Section 6, article 2, of the constitution, is: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the person or thing to be seized." And section four of division eighteenth, of the Criminal Code (Gross' Stat. 1869, p. 208) provides that it shall be lawful for any judge of the supreme or circuit court, in his circuit, and any justice of the peace, in his county, "upon oath or affirmation being made before him, that any person or persons have committed any criminal offense in this state, or that a criminal offense has been committed, and that the witness or witnesses have just and reasonable grounds to suspect that such person or persons have committed the same, to issue his warrant under his hand," etc.

It will have been observed that the affidavit in this record wholly omits to state either that the person therein described committed the offense for which the warrant for his arrest was issued, or that the person at whose instance and upon whose complaint it was issued, had just and reasonable grounds to suspect, or did in fact suspect, that he was guilty of such offense.

It is true that the recent possession of stolen property, unexplained, raises a presumption that the person in possession stole it; but this is only a rule of evidence, and the presumption may be overcome by proof showing that the possession is not inconsistent with an honest intention. The citizen is, both by the constitution and the law, entitled to be free from arrest, by warrant on a criminal charge, until a complaint under oath or affirmation is made, charging that a crime has been committed, and that there is probable cause to suspect that he committed the same. For aught that appears in this affidavit, the prisoner may have honestly come to the possession of the property claimed to have been stolen, by purchase, or by borrowing, or by finding; and this may have been known to the person making the affidavit. There is nothing in the affidavit necessarily inconsistent with this idea. Without saying more, it is sufficient that, in our opinion, the affidavit was insufficient to give jurisdiction for the purpose of issuing the warrant. A majority of the court are of opinion that, the affidavit being insufficient, the prisoner was improperly deprived of his liberty, and he was justified in asserting his right to freedom, guaranteed to him by the constitution and the law, by refusing to submit to the warrant. In breaking away from the officer's custody he committed no offense: *The State v. Leach*, 7 Conn., 752.

The rule, as found in treatises upon criminal law, is, that whenever an imprisonment is so far irregular that it is no offense in the prisoner to break from it by force, it will be no offense in the officer to suffer him to escape: 2 Hawk. P. C., ch. 29, sec. 2; Roscoe's Criminal Evidence, 459; 1 Russell on Crimes, 417.

It is true, as contended by the state attorney, that as the warrant was regular on its face, the officer who made the arrest, and the appellant who received the custody of the prisoner, would be protected in an action for assault and false imprisonment, in consequence of his arrest and deprivation of liberty, but it does not follow therefrom that appellant was bound to obey the warrant. The somewhat anomalous condition that a sheriff or constable occupies in such cases is well explained in *Tuttle et al. v. Wilson*, 24 Ill., 561.

It is there said: "The rule that a ministerial officer is protected in the execution of process issued by a court, or officer having jurisdiction of the subject matter, and of the process, if it be regular on its face, and does not disclose a want of jurisdic-

tion, is a rule of protection merely, and beyond that confers no right; it is held to be personal to the officer himself, and affords no shelter to the wrong-doer, under color of whose process, if it be void, the officer is called upon to act.

"Such an officer may stop in the execution of process, regular on its face, whenever he becomes satisfied there is a want of jurisdiction in the officer or court issuing it; and if sued for neglect of duty, may show in his defense such want of jurisdiction: *Earl v. Camp et al.*, 16 Wend., 562. He can, if he chooses, take the responsibility of determining the question of jurisdiction, or any other question to which the process may give rise."

The justice of the peace not having been invested with jurisdiction by the affidavit to issue the warrant, it was void, and it necessarily follows that the court erred in giving the instructions, and that appellant's conviction was improper. The judgment is reversed and the defendant discharged.

Judgment reversed.

STATE v. DOCKSTADER.

(42 Iowa, 436.)

PRACTICE: *Failure of defendant to call witnesses to his character—Erroneous charge.*

The failure of a defendant to call witnesses to prove a previous good character, does not justify any presumption against him, and it is error for the court to instruct the jury that they have a right to consider it as a circumstance against him.

The defendant was indicted for the crime of receiving and aiding in concealing stolen goods. The court, among other instructions, gave the following: "Where evidence is produced by the state against a defendant indicted for crime, of facts which, if true, affect or cast a shadow on his character for honesty, the defendant has a right to produce evidence to show that his general character among his neighbors and acquaintances is good, as tending to explain what may appear dark against him. If he does not choose to do so, the jury must consider the case with the shadow which is thus cast on his character. In cases where the evidence of guilt is circumstantial only, evidence of previous good character of the accused is valuable to his defense,

and a failure on his part to produce it, when it is clearly in his power, if his character is in fact good, is a circumstance proper for the jury to consider with the other evidence of the case." To this instruction the defendant excepted. The defendant, having been found guilty and sentenced, appeals.

D. W. Poindexter and *L. M. Race*, for appellant.

M. E. Cutts, for appellee.

ADAMS, J. Where a person is charged with a crime, the failure to call witnesses to prove his general good character raises no presumption against it: *State v. Kabrick*, 39 Iowa, 277; *State v. O'kill*, 7 Iredell, 251; *People v. Bodin*, 1 Dana, 282; *People v. White*, 24 Wendell, 520.

Reversed.

SPARRENBARGER V. STATE.

(53 Ala., 481.)

PRACTICE: *Indictment must be founded on legal evidence—Shop not the same as store.*

An indictment can only be based upon legal evidence adduced before the grand jury. The grand jury has no right to find an indictment, upon another indictment against the respondent for the same offense found by another grand jury at a previous term, which had been quashed. And, on a motion to quash, supported by evidence that the indictment was found solely on the former indictment, and without any other evidence, it should be quashed. See note to *State v. Leicham*, *ante*, p. 132.

The objection to the validity of an indictment, on the ground that it was found by the grand jury without any legal evidence, must be taken by a motion to quash, and not by a plea in abatement.

The word shop is not equivalent to the word store, and indictment charging the defendant with keeping "open shop" on Sunday, does not charge any offense under a statute prohibiting keeping "open store" on Sunday.

BRICKELL, C. J. It is a well established rule of criminal pleading, that if an offense is purely statutory, the indictment must pursue the words of the statute, so as to bring the defendant precisely within it. There is much conflict of authority as to the precision which must be observed in following the language of the statute. Some authorities require that the exact words of the statute must be employed. Others regard the rule as satisfied if words substantially the same, or equivalent—of

the same legal import with the words of the statute—are used. This is the rule which has prevailed in this court from an early day: *State v. Brown*, 4 Port., 410; *State v. Stedman*, 7 Port., 495; *State v. Duncan*, 9 Port., 260; *Turnipseed v. State*, 6 Ala., 664; *Worrell v. State*, 12 Ala., 732; *State v. Bullock*, 13 Ala., 413; *Skains & Lewis v. State*, 21 Ala., 218. If the words employed in the indictment as descriptive of the offense have not the full signification of the words of the statute—if they are narrower in meaning—they cannot be deemed sufficient. An examination of the indictment would not authorize the court to declare the offense had been committed, nor would it inform the defendant of the precise nature of the accusation. The indictment was intended to be founded on the clause of the statute to punish Sabbath-breaking (R. C., sec. 3614), which is in these words, “or who, being a merchant or shop-keeper (druggist excepted), *keeps open store* on that day.” The sufficiency of the second count alone is presented for consideration, a demurrer to the first count having been sustained by the city court. The count preserves the words of the statute, except that it substitutes the word *shop* for the word *store*, alleging, not that the defendant did keep *open store*, but that he did keep *open shop* on the Sabbath. It is insisted the word *shop* is the equivalent and of the same legal import of the word *store*, in the connection in which the latter word is found in the statute, and that, therefore, the count is good. The word *store* is of larger signification than the word *shop*. It not only comprehends all that is embraced in the word *shop*, when that word is used to designate a place in which goods or merchandise are sold, but more, a place of deposit, a *store-house*. In common parlance, the two words have a distinct meaning. We speak of *shops* as places in which mechanics pursue their trades, as a *carpenter's shop*, a *blacksmith's shop*, a *shoemaker's shop*. While, if we refer to a place where goods and merchandise are bought and sold, whether by wholesale or retail, we speak of it as a *store*. Druggists are excepted from the operation of the statute. Unless in derision, we would never say a *drug shop*, but a *drug store*. There are but few, if any, who would understand that a man had a *store*, and was engaged in buying and selling goods or merchandise, if we said he had a *shop*. We never speak of the place in which the mechanic exercises his trade as a *store*, nor do we speak of the place in which goods are bought and sold as a

clearly in his
stance proper
of the case.”
the defendant,

t.

a crime, the
ood character
ick, 39 Iowa,
din, 1 Dana,

Reversed.

not the same as

uced before the
ndictment, upon
ffense found by
quashed. And,
ndictment was
other evidence,
p. 132.

und that it was
t be taken by a

ment charging
oes not charge
re” on Sunday.

of criminal
e indictment
g the defend-
authority as
ring the lan-
at the exact
gard the rule
nivalent—of

shop. A *dollar shop* would scarcely convey to the understanding of any the idea of a place where goods purport to be sold at a price not greater than one dollar for any article exhibited, while such is the signification of *dollar store*. Whatever may be the signification lexicographers attach to words, they acquire a local meaning, and often a peculiar meaning, in particular communities, which courts must observe in the construction of statutes, or of contracts, or of conveyances, if the legislative intent, or the intent of parties is to govern. Hence, technical words receive their technical signification in the absence of a counter-vailing intent, and so of terms of art. Words in common use, when a manifest legislative intent is not contravened, receive their ordinary and popular signification. In *Mayor, etc., v. Winter*, 29 Ala., 651, the words "internal improvements," in a statute conferring upon a municipal corporation authority to issue bonds for the purpose of such improvements, was not construed as referring merely to *improvements* within the corporation, but to *improvements* within the state, because such was the popular signification of the words. In *Favers v. Glass*, 22 Ala., 621, it was declared that when a word is used in a statute which has two significations, it should, ordinarily, receive that meaning which is generally given to it in the community, unless it is inconsistent with the manifest legislative intent. The word *store* has with us a popular signification, as a house where goods are bought and sold, or stored, and such is its signification in the statute under consideration. The statute intends the prohibition of worldly avocations on the Sabbath. It is the keeping open the store for buying or selling, or for receiving and storing on that day, which is declared criminal. But it is said the word *store* is preceded by the words *merchant or shop-keeper*, as descriptive of the persons who may commit the offense. The word *shop-keeper* was employed, from abundant caution, to exclude a construction which may have been supposed possible, if the word merchant stood alone, that only large, not small, dealers were within the statute. The word *shop*, in any signification which may be given it, is narrower in meaning than the word *store*, and cannot, therefore, be deemed its equivalent, or of the same legal import: *Canney v. State*, 19 N. H., 135. The warehouseman who, on the Sabbath, keeps his store-house open, and pursues his ordinary business therein, would violate the statute, and yet it would be a mere perversion of words to

say he kept *open shop* on the Sabbath. It is to be regretted that inaccuracies of this kind should creep in vitiating criminal convictions. It can be avoided by pursuing the words of the statute, when these fully describe the offense. If words are substituted for them, the pleader should be careful to select such as are equivalent in signification to the statutory words. Keeping open shop on the Sabbath is not an offense, and that is the grievance of the charge in the count. Indictments in support of indictments are not allowable. The averments of the indictment may all be true, and the appellant guiltless. He may be a merchant or shop-keeper, owning a blacksmith or other shop for mechanical trades, which he kept open on the Sabbath, thus verifying every word of the indictment, and the statute not violated.

The grand jury, in the investigation of a charge for any indictable offense, can receive no other evidence than is given by witnesses before them, or legal documentary evidence: R. C., sec. 4103. The concurrence of at least twelve grand jurors is necessary to find an indictment: R. C., sec. 4104. If the matter of the pleas in abatement is true, these statutory provisions were violated or disregarded by the grand jury, and the paper purporting to be an indictment is not such in fact. While the proceedings are *in fieri*, the court has an inherent power to strike from its files any paper which has been wrongfully, without the warrant of law, introduced into them, or to amend defects or to expunge from its records matter not true or pertinent, which may have been inadvertently, or, if the fact should appear, fraudulently, inserted in them. When, before final judgment, and there has not been a want of diligence in calling the attention of the court to the fact, it appears that a paper, purporting to be an indictment, has not been returned into court as a "true bill," with the concurrence of twelve of the grand jurors, it should be quashed and stricken from the files. So, if it appears it was found without the evidence of witnesses, or without legal documentary evidence. We adopt the language of the court in the case of *The U. S. v. Coolidge*, 2 Gall., 367: "The grand jury is the great inquest between the government and the citizen. It is of the highest importance that this institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal." See, also, 1 Green. Ev., sec. 252; Law's Case, 6 Greenl. (Me.), 439. The objection can-

not, however, be taken by plea: *People v. Hulbert*, 4 Denio, 133. As a general rule, pleading to an indictment admits its genuineness as a record: *State v. Clarkson*, 3 Ala., 378; *Russell v. State*, 33 Ala., 366. The inquiry the objection involves is not triable by a jury; it is addressed to the court, and to its power over its records. The indictment is not abated; a better indictment is not given; that which appears on the file may be perfect in form and allegation—free from defects. The objection, as is said in Law's case, goes not to its abatement, but to its annihilation—to the denying it ever had a legal existence. The verity of a record is not disputable by plea, nor by evidence on the trial; for a plea averring against a record cannot be entertained, and evidence is not admissible, unless it is in corroboration of, or corresponds to, pleading. But the court has power over its records, and it is a sacred duty that they should be made to speak the truth, and not witnesses of falsehood. On a motion to quash or strike from the files, addressed to the court with reasonable diligence, after the facts have been discovered, supported by evidence, leaving no reasonable doubt on the mind of the court that the indictment was not the finding of twelve of the grand jury; or that it was found without the evidence of witnesses before them, or legal documentary evidence, truth and justice, the preservation of the verity and dignity of its own records, the protection of the citizen and constitutional guaranty demand that the court should expunge the spurious paper. It is not an accusation the citizen should be held to answer; it is without warrant of law. This case does not require us to say more. The pleas in abatement were subject to demurrer, because the matter they contained was not the subject of a plea. It is scarcely necessary to say, that when it appears witnesses were examined by the grand jury, or the jury had before them legal documentary evidence, no inquiry into the sufficiency of the evidence is indulged. A former finding by a grand jury, which has been quashed, or on which a *nol. pros.* has been entered, is not legal documentary evidence on which a succeeding grand jury can properly find an indictment.

For the error in overruling the demurrer to the indictment, the judgment must be reversed, and the cause remanded. The appellant must remain in custody until discharged by due course of law.

PEOPLE v. MORRISETTE.

(20 How. (N. Y.) Pr., 118.)

PRACTICE: *Suspending sentence*

No court, without a special statutory authority, possesses the power to suspend sentence indefinitely. It is the duty of the court to pronounce judgment in the case of every person convicted.

The following opinion was delivered in a case where an application was made for a suspension of sentence :

BALCOM, J. I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a *quasi* pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor.

I have learned, by the newspapers, that the recorder of this city occasionally suspended sentence upon verdicts or pleas of guilty, and I asked him last week where his authority was for so doing. He told me he thought there was an old statute applicable to his court, authorizing the suspension of judgment upon criminals in certain cases. I have been unable to find any such statute, and the district attorney has said he does not know of any.

Two of the justices of the Supreme Court, residing in this city, have informed me that they are not aware of any such statute, or of any authority for suspending sentence against criminals who have been found guilty by a jury, or have pleaded guilty.

I have heard that criminal courts, in some parts of the state, and even justices of the peace, have lately assumed the right to suspend sentencing prisoners found guilty of crime before them. But I am of the opinion no court in the state is authorized to do so. I think it is the imperative duty of every court to pronounce the judgment prescribed by law upon all persons con-

victed of crime before them, unless steps are taken for a new trial, or a motion be made in arrest of judgment, for some defect in the indictment. A stay of the sentence may be granted where a *certiorari* is sued out, and a stay of judgment may also be granted upon a writ of error. But no suspension of sentence or stay is authorized except upon a *certiorari* or writ of error. For these reasons I must refuse to suspend sentence in this case.

The prisoner was then sentenced to imprisonment in the penitentiary for six months.

MORGENSTEIN V. COMMONWEALTH.

(27 Gratt. (Va.), 1018.)

PRACTICE: *Indictment — Duplicity — Liquor selling.*

Under a statute imposing a penalty for the sale of liquor to a minor, an indictment charging the sale of liquor, at a certain time and place, to "certain minors, the names of whom are to the grand jurors unknown," charges but one offense, and is not bad for duplicity.

Under a law punishing the sale of liquor to minors, the sale of the liquor to the minor is an offense against the person, and the name and identity of the person to whom the liquor was sold are material, and where the indictment alleges a sale to minors whose names are unknown to the grand jurors, if the evidence on the trial shows that the names of the minors were known to the grand jurors, the variance is fatal, and the defendant must be acquitted.

CHRISTIAN, J. These two cases were heard together in this court. The questions we have to determine are the same in both cases.

They are prosecutions against the plaintiffs in error respectively, for a violation of the statute making it a penal offense, "if any person shall sell or barter, or cause to be sold or bartered, or being a merchant or tradesman, or keeper of an eating house or ordinary, shall directly or indirectly give or furnish, or dispose of, or shall permit to be sold or bartered, or given or disposed of by his clerk or agent or salesman, to any minor, knowing him to be a minor, without the consent of his parent or guardian, any wine or ardent spirits or mixture thereof," etc. Under this statute the plaintiffs in error were indicted in the hustings court of the city of Richmond, for selling ardent spirits "to certain minors, the names of whom are to the grand jurors

unknown." The plaintiffs in error were found guilty, and a fine assessed by the jury at \$10 in the one case and \$20 the other. Whereupon it was ordered and adjudged by said hustings court, that the plaintiffs in error be confined in jail until the fines are paid, and that each enter into bond, with good security, "to be of good behavior toward all the citizens of this commonwealth for the space of one year." To this judgment writs of error were awarded by one of the judges of this court.

The court is of opinion that there is no error in the judgment of the said hustings court, in overruling the motion to quash the indictments, this court being of opinion that the said indictments set forth with sufficient distinctness the offense punished by the statute; and that said indictments do not contain charges of two distinct offenses. See *Young's Case*, 15 Gratt., 664. But the court is further of opinion, that the record shows that there was a variance between the charges made in the indictments, and the proof upon the trial, as certified by the court, for which the verdicts ought to have been set aside, and new trials ordered, upon other indictments to be found against the plaintiffs in error.

The variance consisted in this, that while the indictments charged the defendants (plaintiffs in error here) with having sold and furnished ardent spirits to certain minors, "the names of whom are to the grand jurors unknown," the proof is clear that in both cases the names of these minors were known to the grand jury. It is a well settled rule of criminal law, that in that class of offenses, where the act of constituting the offense is an injury to the person, the name of the injured party must be stated when known. If the name of the party injured be unknown, he should be described as "a person to the jurors aforesaid unknown." But this is a material allegation, and if it turns out in the trial that the name of the person so described in the indictment was known to the grand jury, the variance will be fatal, and the accused must be discharged from that indictment and tried upon another, charging the name of the person injured: 1 Arch. Cr. Pl., 80-81 (marg.), and cases there cited; 1 Whar. Am. Cr. Law, sec. 251; 1 Bishop Cr. Pro. (2d ed.), secs. 541-552; 1 Chitty Cr. Law, 213-214 (marg.)

The case before us comes within the rules above stated. The offense punished by the statute is the selling or furnishing ardent spirits to minors, without the consent of the parent or guardian.

The offense denounced by the statute is a direct injury to third persons.

It is very manifest that the object and aim of the statute was to protect the young against the evils of the bar-room and the grog-shop. It was enacted to guard and defend the minor against an injury to him—an injury, it may be, as fatal and deadly as the hand of the robber or the knife of the assassin.

In these cases it may be further said, that the offense punished by the statute is an offense against the person in a double sense. It is not only an offense against the minor, but an injury against the "parent or guardian." Surely, no more grievous injury can be perpetrated against a parent or a guardian than that which entices the son or the ward, at the early age of minority, to become the frequenter of a bar-room, and to contract, in early life, the habit of indulgence in strong drink. The statute was enacted not only for the good of society in general, and the maintenance of order and good morals, but for the protection of both the minor and the parent or guardian.

The cases before us are, therefore, brought within that class of cases where the act constituting the offense is an injury to third persons. In such cases it is well settled that the name of the person, if known, must be stated, and if described as "a person to the jury unknown, and it turns out, upon the proof, that the names were known, this will be a fatal variance. The cases relied on by the attorney-general are not in conflict with the authorities above cited, or the views herein stated.

The case of *Commonwealth v. Smith & Burwell*, 1 Gratt., 553 (of which we have a very meagre report, no opinion being given, but simply a resolution of the general court), was a prosecution for selling ardent spirits to slaves, without the consent of their masters, etc. The indictment in that case charged the defendants with selling ardent spirits "to slaves, whose names, or whose owners' names, were to the jurors unknown." The case came up on a demurrer to the indictment. The indictment was held good. This was the only question made by the record. If it had been proved in that case that the names of the owner and of the slaves were known to the grand jury, the question would have been a very different one. Then the question raised would have been, was there a variance between the allegations and the proof? But no such question was raised, and the deci-

sion must be taken to be confined to the demurrer, as the only question raised on the record.

The other case relied on by the attorney-general is *Hulstead's Case*, 5 Leigh., 724. That was a prosecution for selling ardent spirits without license. The indictment charged the sale, without license, "to persons to the jurors unknown." Evidence was offered, at the trial, tending to prove that the persons to whom the sale was made were known to the grand jury. The defendant moved the court to instruct the jury, that if they should find that the person to whom he sold the spirits, in the indictment mentioned, was in fact known to the grand jury at the time the indictment was found, the commonwealth could not sustain this indictment. The court refused to give this instruction. The general court affirmed the decision of the county court, and held that this was not a material variance between the proof and the charge in the indictment; that it was not necessary in indictments for such offenses (*i. e.*, for selling ardent spirits without license) to name the person to whom the liquor was sold, and that the words in that indictment, "to persons to the jurors unknown," are surplusage.

But in that case the court said: "The offense of retailing spirits is distinguishable from that class of offenses where the act constituting the offense is an injury to a third person, such as murder, larceny, etc., in which the name of the injured party ought to be stated when known. The reason of that rule does not apply to that class of offenses to which retailing ardent spirits, without license, belongs; offenses, in which the act constituting the offense, is not an injury to third persons."

This case is entirely consistent with the rules of criminal law above stated, and is not at all in conflict with the authorities above cited.

The offense of selling ardent spirits, without license, is not an offense against third persons, but an offense against the revenue laws, and, it may be, against social order and public morals. The offense is the selling without license. It matters not to whom or to what person it is sold; and, therefore, the name of the person is immaterial to be stated. But, under the statute upon which the indictments before us are found, the offense is not the mere selling of ardent spirits, but selling or furnishing the same to a minor, without the consent of the parent or guardian.

In such a case, the act constituting the offense is an injury to third persons, and, therefore, the person, if known, must be named in the indictment; and if charged as "a person to the jurors unknown," when, in fact, he is known, this will be a fatal variance.

The court is, therefore, of opinion that the judgment of the said hustings court, in both cases, be reversed, and the defendants be discharged from further prosecution under said indictments; subject, however, to be tried under other indictments (if any be so found against them), setting forth the names (if such names be known), of the minors to whom ardent spirits were sold or furnished.

Judgment reversed.

REYNOLDS V. PEOPLE.

(83 Ill., 479.)

PRACTICE: *Accessory after the fact.*

One indicted as principal in a larceny cannot, under that indictment, be convicted as accessory after the fact. The two offenses are essentially different in their natures, and the latter is not a lower grade of, or included within the former.

The dictum to the contrary, in *Yoe v. People*, 49 Ill., 410, is overruled.

SCOTT, J. It is very clear the conviction of Reynolds cannot be sustained under the present indictment.

Of the crime of larceny, for which he was indicted jointly with others, he was acquitted, but, the principal being found guilty, he was found guilty as an "accessory after the fact." This conviction is without warrant of law.

An accessory is defined in the statute to be one "who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of crime." One thus guilty is considered a principal, and punished accordingly.

An "accessory after the fact" is not punished under our statute as a principal. A less measure of punishment is provided. The definition given in the statute, as well as at common law, makes a clear distinction in the offenses. Under our law, "every one not standing in the relation of husband or wife, parent or

child, brother or sister, to the offender, who knows the fact that a crime has been committed, and conceals it from the magistrate, or who harbors, conceals, maintains or assists any principal felon or accessory before the fact, knowing him to be such, shall be deemed an accessory after the fact."

One offense defined is a felony, and the other is but a misdemeanor. Text writers record it from the old books, that "every treason includes a misprision of treason, and every felony a misprision of felony," and such misprision is but a misdemeanor. It has been definitely declared in the decisions of this court, as in *Carpenter v. The People*, 4 Scam., 197, where a defendant is put upon his trial for a crime which includes an offense of an inferior degree, he may be acquitted of the higher offense and convicted of the lesser, although there may be no count in the indictment specifically charging that particular offense. Illustrations are given in other cases. Where the crime charged is murder, the accused may be convicted of manslaughter, or where the crime charged is rape, the conviction may be for attempt to commit a rape. The principle is, the graver offense necessarily includes the lesser, and proof of the higher crime cannot be made without proof of all that which it includes. But this rule always implies the lesser offense is included in the higher crime with which the accused is specifically charged, and if it is not a constituent element in the higher crime charged, no conviction can be had. *Carpenter v. The People*, *supra*; *Beckwith v. The People*, 26 Ill., 500.

The offense of which an "accessory after the fact" may be guilty is not included, nor has it any connection with the principal crime. This is apparent from the definitions given, both in our statute and in the common law.

The one cannot be committed until the principal offense is an accomplished fact. Persons occupying a certain relation to the offender are excluded from the operation of the statute. The guilty knowledge, which is the essence of the offense, comes after the principal crime is committed, and of course they can have no connection with each other. But no better test need be sought than the fact a party indicted as a principal and acquitted, may yet be indicted as an "accessory after the fact," or if indicted as an "accessory after the fact" and acquitted, he may be indicted as a principal, and the reason assigned in the common law authorities is, "they are offenses of several natures."

Hence a conviction for one is no bar to a prosecution for the other. Hale's Pleas of the Crown, vol. 1, 626.

What was said in *Yoe v. The People*, 49 Ill., 410, on this subject, was not necessary to the decision, and on more mature reflection we are satisfied it was not correctly stated.

According to the finding of the jury, the accused did not participate in the principal crime for which he was indicted, but was found guilty of a misdemeanor subsequently committed, with which he had not been charged. This is not according to the analogies of the laws. Proof of the principal felony does not prove nor tend to prove a party is guilty as an "accessory after the fact."

It would be a most illogical conclusion. As at common law, so under our statute, they are "offenses of several natures." The judgment will be reversed, and the cause remanded.

Judgment reversed.

PEOPLE V. AH LING.

(51 Cal., 372.)

PRACTICE: *Reasonable doubt — Erroneous charge.*

It is error to instruct a jury that "if the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law."

WALLACE, C. J. The court below, after instructing the jury that the defendants, on trial upon an indictment for murder, are presumed to be innocent until proven guilty beyond a reasonable doubt, proceeded as follows: "A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge. The doubt must not be vague and shadowy. Absolute certainty is rarely attainable, and is never required. *If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.*" The defendants excepted to so much of the instruction as is italicized.

I do not understand the attorney-general to claim, in argument here, that the latter portion of the instruction can be supported. In *People v. Brannan*, 47 Cal., 96, the jury had been told that they might convict, if "*satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.*" We held the instruction in that case erroneous, because it required nothing more than a mere preponderance of evidence to work a conviction of the prisoner. I do not perceive any substantial difference between the instruction considered in that case and the one under consideration in this case, and the views we then expressed upon the point I think decisive of this appeal. It is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such "*that a man of prudence would act upon it in his own affairs of the greatest importance.*"

"Men frequently act in their own grave and important concerns (said the court of appeals of Kentucky) without a firm conviction that the conclusion upon which they proceed to act is correct; but having deliberately weighed all the facts and circumstances known to them, they form a conclusion upon which they proceed to act, although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In such a case, the jury should be fully convinced of the correctness of their conclusion that the prisoner was guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion was correct;" *Jane, a Slave, v. Commonwealth*, 2 Metcalf, 30. In that case the jury had been instructed that if they should conclude, from the facts and circumstances proven, "that there is that *degree of certainty* in the case, that they would act on it in their own grave and important concerns, that is the degree of certainty which the law requires, and which will justify and warrant them in returning a verdict of guilty." See, also, *State v. Oscar*, 7 Jones R., N. C., 305.

Judgment reversed, and cause remanded for a new trial.

HOSKINS V. PEOPLE.

(84 Ill., 87.)

PRACTICE: *Record — Plea.*

In a criminal case there is no issue formed, and can be no valid trial until the respondent has pleaded. Where a conviction has been had, without a plea having been entered, the conviction must be set aside, and the cause remanded, with directions to arraign the prisoner and proceed to a new trial, although the record shows that prior to the former trial, the respondent waived arraignment.

Scott, J. Defendant was indicted, at the August term of the circuit court of Marion county, for larceny. On the trial, he was found guilty, and sentenced to the penitentiary for a period of three years.

It appears, from the record, that defendant "waived arraignment, copy of indictment, list of jurors and witnesses," etc., but no plea of any kind was entered. So far as this record discloses no plea was entered before the accused was placed on trial. On the authority of the former decisions of this court, this was error: *Johnson v. The People*, 22 Ill., 314; *Yandt v. The People*, 65 *Id.*, 372. It was held in those cases that, without an issue formed, there could be nothing to try, and the party convicted could not, properly, be sentenced. This error may be corrected, and the accused may be arraigned and required to plead to the indictment before he is again placed on trial.

The judgment will be reversed and the cause remanded.

Judgment reversed.

SHELDON, C. J., BREESE, J., and CRAIG, J., do not concur in this opinion. The record shows the prisoner expressly waived an arraignment, which, *per se*, includes the plea. We think the waiver of arraignment was a waiver of the formal entry of a plea of not guilty. The prisoner has had a fair trial by a jury, and was adjudged guilty. The entry of a plea, under the circumstances, was mere form, and unnecessary. If objections so technical as this are to prevail, it will be difficult to enforce the criminal code. The prisoner has had an impartial trial by a jury of the vicinage, on a good indictment, and was tried in the same manner, and asked instructions, as though a plea of not guilty

had been interposed. We perceive no ground for reversing the judgment, as the facts proved are conclusive against him.

NOTE.—See *State v. Cassady*, 12 Kas., 550 (S. C., 1 Am. Cr. Rep., 567), where it was held that respondent having gone to trial without a plea could not avail himself of that fact after verdict. See, also, *Grigg v. People*, 31 Mich., 471 (S. C., 1 Am. Cr. Rep., 602); *Eisenman v. State*, 49 Ind., 520 (S. C., 1 Am. Cr. Rep., 605); *Davis v. State*, 38 Wis., 487 (S. C., 1 Am. Cr. Rep., 606), in harmony with the decision of the majority of the court in this case.

SMITH v. STATE.

(45 Md., 49.)

PRACTICE: *Repeal of law pending appeal.*

Where the law under which the respondent is indicted is repealed, pending his appeal and before any final judgment has been pronounced, the repeal of the law abates the proceedings and no judgment can be pronounced.

STEWART, J. It appears that since the trial of this case in the circuit court, and pending this appeal, the act of 1876, ch. 273, has been passed, superseding the act of 1867, ch. 390, under which the prosecution was instituted; the conviction of the appellant must therefore fail. Whether considered as an amending or repealing statute, section 55 of the Code of public local laws of Anne Arundel county, as it stood at the time of the prosecution, has been abrogated or modified in important particulars. There is no law, now in existence, which would enable the court to pronounce judgment upon the verdict.

Pending cases are not excepted, or reserved, in the repealing law of the late session.

The repeal of a law imposing a penalty is, of itself, a remission of the penalty, where there is no reservation. A party cannot be adjudged guilty after the law under which he may have been prosecuted and convicted has been repealed, although the offense may have been committed before the repeal.

The decision of the court must be in accordance with the law as it stands at the time of the final judgment: *Keller v. State*, 12 Mo., 322. It follows that the indictment and proceeding in this case must be quashed, and it is unnecessary to decide upon the point made and noted in the bill of exceptions.

Indictment quashed.

Decided 15th June, 1876.

STATE V. THOMPSON.

(46 Iowa, 699.)

PRACTICE: *Excessive sentence.*

The extreme penalty of the law is only to be inflicted in the most aggravated cases. In this case the trial judge having imposed the extreme penalty of the law, in a case which was manifestly not of the most aggravated character, the term of imprisonment was reduced by the Supreme Court from ten to five years.

The defendant and Caroline Sheets were jointly indicted for the crime of incest. The defendant was alone tried, was found guilty, and sentenced to be confined in the penitentiary for the period of ten years. Defendant appeals.

DAY, CH. J. No complaint is made of the instructions of any ruling upon the trial. The evidence is conflicting, but it fairly sustains the verdict. Indeed, it is not claimed by appellant that there is such a want of evidence that we would be justified in disturbing the verdict.

The whole purpose of the appeal seems to be to procure a reduction of sentence. We are asked to reduce the punishment to imprisonment for eighteen months or two years. The crime of incest is a very revolting and disgusting one, and society very justly demands that it should be severely punished. Still, this crime, like every other, has its grades of aggravation and enormity. The legislature, recognizing this fact, has prescribed that the punishment for this crime shall be imprisonment in the penitentiary for a term not exceeding ten years and not less than one year, intending that between these limits of one and ten years the court pronouncing sentence shall apportion the punishment to the circumstances of the crime. Caroline Sheets, with whom the crime was committed, is defendant's step-daughter. The defendant married Caroline's mother in December, 1872. The crime charged was committed about two years thereafter. The age of Caroline does not appear, but she is the mother of two bastard children.

The evidence does not show that any seductive arts were employed. The defendant and Caroline are not related in any degree by consanguinity. It must be admitted that much more aggravated cases of this crime frequently occur. And this

admission, we think, establishes the impropriety of imposing the highest penalty of the law.

If Caroline Sheets had been defendant's own daughter, or his niece even, the offense would have been a greatly aggravated one. Yet for such an offense, the court could have inflicted no greater punishment than has been imposed.

In view of these facts, whilst we cannot regard the offense so lightly as we are asked to do by defendant's counsel, still we think the punishment disproportionately severe. We think that an imprisonment in the penitentiary for the period of five years will answer all the just purposes of punishment, and atone to society for the outrage committed upon it, so far as such atonement is possible. The term of sentence will be reduced to five years from the date of incarceration.

Thus modified, the judgment is affirmed.

NOTE.—In considering this case, it must be borne in mind that the code in Iowa prescribes that the Supreme Court "may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it:" Iowa Code, 1873, sec. 4538. Without such a provision, no appellate tribunal has ever exercised such an authority. The case is valuable, however, everywhere, as illustrating one of the principles which should always be regarded in passing sentence.

STATE v. DRIVER.

(78 N. C., 423.)

PRACTICE: *Excessive sentence.*

The constitutional provision that "cruel and unusual punishment shall not be inflicted" must be given effect by the courts; and where the trial judge imposes a sentence of excessive severity, judgment will be reversed and the cause remanded for a proper sentence to be imposed.

On a conviction for assault and battery, a sentence of imprisonment in the county jail for five years, and at the expiration thereof to give security with sureties in the sum of \$500 to keep the peace for five years, is excessive and erroneous.

READE, J. "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." Const., art. 1, sec. 14. This is a provision in our state constitution and in the constitution of the United States, and is a copy of the English bill of rights.

The defendant was indicted for an assault and battery upon his wife, and was convicted and sentenced to imprisonment in the county jail for the space of five years, and at the expiration thereof to give security to keep the peace for five years in the sum of \$500 with sureties. Being unable from poverty to appeal, he files his petition in this court for a *certiorari* to bring up the case for review, upon the ground that the sentence was violative of the constitution, in that it imposes upon him "cruel and unusual punishment."

We have no information of the particulars of the charge against him, except what he states in his petition. He states that, while in a passion and under the influence of drink, he whipped his wife with a switch with such severity as to leave the marks for two or three weeks, and that he kicked her once, and that he had whipped her before, but not with the same severity, and that when brought to trial he pleaded guilty and submitted. Taking that statement to be true, it would seem that he is a bad man, and not likely to have much of the public sympathy, and it is not unnatural that his honor should have been moved to some severity against him. But still there are two questions for us to determine: first, is the sentence of the court unconstitutional; and, second, is it a matter which we can review? In *State v. Miller*, 75 N. C., 73, which was an assault with intent to kill, the defendant was sentenced to five years' imprisonment in the county jail. A new trial was given on other grounds, and it was not necessary that we should decide whether the punishment was lawful, but we clearly intimated our opinion that it was not. We stated that the oldest member of this court did not remember an instance where any person had been imprisoned five years in a county jail for *any* crime however aggravated. And no instance was cited at the bar, in the argument of that case or this, although inquiry was made of the bar, of such a term of imprisonment.

We have examined our Revised Code, which was prior to our penitentiary system and to our constitution of 1868, when imprisonment was altogether in the county jails, and, unless we have inadvertently overlooked some crime, there was none the punishment whereof was for so long a time. In many cases the punishment was specified; in others it was not to be less than so and so; in others not exceeding so and so, and in others at the discretion of the court; these last being generally *small*

offenses where it was not usual to punish much; and to cover all cases of felony where the punishment was not specific, there was the following provision: "Every person who shall hereafter be convicted of any felony for which no specific punishment shall be prescribed by statute, and which is now allowed the benefit of clergy, shall be imprisoned at the discretion of the court not exceeding two years; or if the offense be infamous, the court may also sentence the convict to receive one or more public whippings, to stand in the pillory, or pay a fine, regard being had to the circumstances of each case." Revised Code, ch. 34, sec. 27. And in regard to misdemeanors, where the punishment was not specific, they were to be punished as at common law: Revised Code, ch. 34, sec. 120.

So it appears that in clergyable felonies, however aggravated, imprisonment was limited to two years in all cases where the punishment was not specific; and it has escaped our attention if in any case imprisonment was prescribed exceeding two years, except in the cases of embezzlement by the state treasurer and in counterfeiting and forgery, where it might be three years. It would seem to be clear that what is greater than has ever been prescribed, or known or inflicted, must be "excessive, cruel and unusual."

Now, it is true, our terms of imprisonment are much longer, but they are in the penitentiary, where a man may live and be made useful; but a county jail is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless, but a heavy public expense.

Taking it to be that the sentence is unlawful, is it subject to review, or is it *entirely* discretionary with the judge below? An unlawful, unconstitutional judgment of an inferior court, affecting the liberty of the citizen, not the subject of review by the court of appeals, where every order or judgment involving a matter of law or legal inference is reviewable! There cannot be a doubt about it. There is no such anomaly.

It is true that we find very little authority about it, which is probably owing to the fact that the administration of our criminal law is so uniformly humane that there is seldom occasion for complaint. Mr. Justice Story, in commenting on this provision of the constitution of the United States, says: "The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government

should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of the Stuarts. In those times a demand of excessive bail was often made against persons who were odious to the court and its favorites, and on failure to procure it they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject Mr. Justice Blackstone has wisely remarked, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution :” 2 Story’s Com. on Const., sec. 1896.

It is true that there never has been anything in our government, state or national, to provoke such provision, yet it was thought to be so appropriate, that it was adopted into our bill of rights, and has ever been preserved in our fundamental law, as a “warning.” Nor was it intended to warn against merely erratic modes of punishment or torture, but applied expressly to “bail,” “fines” and “punishment.” And the earliest application of the provision in England was in 1689, the first year after the adoption of the bill of rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire, by the court of king’s bench : 11 State Trials, 1354. His lordship committed an assault and battery on Col. Culpepper in Whitehall, and was tried before the king’s bench, and fined thirty thousand pounds. It does not appear that there was any appeal, but the case was considered in the house of lords, and is very valuable for what was said and done. There were three objections considered by the house of lords to the judgment of the king’s bench. 1. That it was a breach of privilege. 2. That the fine was excessive. 3. The commitment till paid. The judges of king’s bench were summoned before the house of lords to give their reasons. The law lords were asked for their opinions, and after full consideration, the house of lords declared “that the fine of thirty thousand pounds imposed by the court of king’s bench, upon the Earl of Devon, was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land.” In the discussion, it was said : “The law, for the most part, left fines to the discretion of the judges, yet it is to be such discretion as is defined by my Lord Coke, fol. 56, ‘*discretio est discernere per legem quid sit justum*,’ not to proceed according to their own

will and private affection, for, '*talis discretio discretionem confundit.*' So the question is not, whether the judges could fine my Lord Devonshire, but whether they have kept themselves within the bounds and limits which the law has set them."

And again it is said, in the same case: "It is so very evident as not to be made a question whether, in those things which are left to the discretion of the judges, that the law has set them bounds and limits which, as God says to the waves of the sea, 'Hitherto shalt thou go, and no farther.' * * * But if the judge may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay, then it will depend upon the judge's pleasure whether he shall ever have his liberty, and thus every man's liberty is wrested out of the disposal of the law, and is stuck under the girdle of the judges."

Thus it appears, both by precedent and by the reason of the thing, and by express constitutional provision, that there is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is, cannot be prescribed. The constitution does not fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it, under the circumstances of each case, and it ought not to be abused, and has not been abused (grossly) in a century, and probably will not be in a century to come, and it ought not to be interfered with, except in a case like the present, where the abuse is palpable. And when that is the case, then the sleeping power of the constitution must be waked up to protect the oppressed citizen. The power is there, not so much to draw a fine line close to which the judges may come, but as a "warning" to keep them clear away from it.

An argument against the power to review is, that it cannot be made practical, for *we* cannot fix the punishment, but must send the case back to the court below to fix the punishment, and in that case, the judge below may abate so little of the punishment as to amount to nothing. The judge below will do no such thing. Our judges do not act capriciously. We are to suppose that the error already committed was inadvertent, and that the judge below will do precisely right. If the contrary could be supposed, it would be easy to correct a future error, as the past is corrected.

Again, it is said, that it ought to be left to the pardoning power. No, it ought not. The judiciary ought to be a com-

plete system, capable of affording every remedy while it has the subject and the party before it. After these have passed beyond its action, and something supervenes to make it necessary, then the pardoning power may be invoked, and seldom, if ever, in any other case. The judiciary ought not to admit, and the pardoning power ought not to suppose, that it has done its work imperfectly.

In Lord Devonshire's case a safe rule is laid down by which to judge of the reasonableness of punishment: "There are two things which have been heretofore looked upon as very good guides (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion, then to consider that which comes nearest to it." If these rules are observed, the punishment will be such as is "usual," and, therefore, not "excessive" or "cruel." We have already said that the punishment in this case is not only "unusual," but unheard of, and that it is "cruel." It is, therefore, in violation of the constitution, and it is our duty so to declare it.

In 1868-69 the legislature passed an act giving to justices of the peace jurisdiction of assaults and batteries, where no deadly weapon was used and no serious damage done. And, again, in 1873-74, the same jurisdiction was given where there was no intent to kill, and no deadly weapon used or serious damage done. And a magistrate could not punish by imprisonment exceeding one month. In the case before us, there was no intent to kill, no deadly weapon, and no serious (in the sense of dangerous) damage done. That would seem to be a clear expression of the legislative will, that the punishment in this case ought not to exceed one month's imprisonment. There was a motion here in arrest of judgment. But that cannot be allowed. An appeal in a criminal case vacates the judgment, and a *certiorari*, as a substitute for an appeal, has the same effect. So that there is no judgment below, and *we* cannot render judgment in a criminal case, and yet the verdict of guilty stands below, and the verdict is regular and proper, and there must be a judgment upon the verdict. All that we can do is to declare that there is error in the judgment rendered, and have our decision certified, to the end that the proper judgment may be rendered below: *State v. Cook*, Phil., 535; *State v. Mannel*, 4 Deo. and Bab., 20.

There is error. This will be certified.

PER CURIAM.

Judgment reversed.

McDONALD v. STATE.

(45 Md., 90.)

PRACTICE: *Erroneous sentence.*

An appellate court on reversing a judgment because the sentence imposed was not authorized by law, has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose.

MILLER, J. The plaintiff in error was indicted for murder, and on his trial was found guilty of manslaughter, and not guilty of murder. Upon this verdict the criminal court of Baltimore city, in which he was tried, pronounced judgment, sentencing him to "five years imprisonment in the jail of Baltimore city," and this judgment is brought before us for review, by writ of error.

The punishment prescribed by law (act of 1864, ch. 39) for the crime of manslaughter is confinement in the penitentiary for not more than ten years, or, in the discretion of the court, a fine of not more than five hundred dollars, or imprisonment in jail for *not more than two years*, or both fine and imprisonment in jail. The attorney-general admits that through inadvertence a sentence was imposed upon the prisoner which the law does not authorize, and concedes, upon the authority of *Watkins v. The State*, 14 Ind., 412, this judgment must be reversed. That is undoubtedly so, and the only other question we can now decide is, whether upon such reversal this court has the power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. In the absence of legislation conferring that authority upon this court, it is clear it has no power to do either of these things. In *Watkins v. The State*, where the judgment was reversed for a similar defect, the court say, "the effect of the reversal for error in the judgment itself, is properly stated by the counsel for the plaintiff in error in his argument. It defeats all former proceedings in the cause. This will abundantly appear by reference to the following authorities cited by him on this point: Chitty's Cr. Law, 755; 4 Bl. Com., 393; Hawkins, book second, ch. 50, sec. 19." In addition to these authorities we refer to several more recent decisions of the English and Irish courts upon the subject, viz: *Rea v. Ellis*, 5

Barn. and Cress., 395; *King v. Bunne*, 7 Adol. and Ellis, 58; *Silverside v. The Queen*, 2 Gale and Davison, 617; and *Holland v. The Queen*, 2 Jebb and Syme, 357. In each of these, and especially in the first two, it was, upon full review of all previous decisions, denied that a court of error had any power in a case like this, either to remand the record to the court below for the proper judgment, or itself to pronounce such judgment as the law authorized, and *Rex v. Kenworthy*, 1 Barn. and Cress., 711, which was cited in support of the power to remand, is there shown to be a case in which *no judgment* had in fact been given, and it was therefore remitted back to the sessions in order that a judgment might be rendered. In this country also, the decisions wherever the question has arisen, are almost uniform and to the same effect. It was so decided in several cases by the Supreme Court of Massachusetts, and we need refer only to *Christian v. The Commonwealth*, 5 Met., 530. After these decisions, the legislature of that state provided by statute that, "whenever a final judgment in any criminal case shall be reversed by the supreme judicial court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had," and the supreme judicial court of that state has since acted under that statute: *Jacquins v. The Commonwealth*, 9 Cush., 279. In New York there is a series of cases in the inferior courts to the like effect, and in *Ratzky v. The People*, 29 N. Y., 124, the court of appeals of that state held it to be settled law that, but for the authority conferred upon that court by the statute of 1863, it would have no power on reversal of the judgment of the Supreme Court in that case for error in the judgment itself, either to pronounce the appropriate judgment or remit the record to the oyer and terminer, to give such judgment. The statute referred to declared, in effect, that the appellate court shall have power upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the appellate court shall direct. There are also numerous cases in other states where the same question has been incidentally decided in the same way. In *Ex parte Lange*, 18 Wallace, 163, the judges of the Supreme Court of the United States, though differing upon other points, agree

in the proposition that, apart from authority conferred by the legislature, appellate tribunals have only the power of reversal where, in criminal cases, the judgments are entire and not such as the law authorizes to be imposed, and all the cases on the subject are collected and referred to in the dissenting opinion of Mr. Justice Clifford, in that case. We have been able to find but two cases which are in even seeming conflict with the great weight and current of judicial precedent and authority on this question.

One of these is the case of *Kelly et al. v. The State*, 3 Sm. and Mar., 578, decided by the high court of errors and appeals of Mississippi, in 1844. There the judgment was reversed for two reasons: 1st, because it did not appear in the record that the prisoners were personally in court at the time of pronouncing the sentence, and, 2d, because the sentence did not set forth the time from which the imprisonment was to date. For these two errors, say the court, "the judgment of the court below is reversed without disturbing the verdict, and the cause remanded with directions to the court below to pronounce its judgment in accordance herewith, having first duly inquired of the defendants whether they have anything further to urge why its judgment should not then be pronounced." No question was made in argument, and no authority is referred to by the court, in support of the power to remand thus exercised, and this has led us to examine the statutes of that state as to the powers conferred on its appellate court at that time. As we expected, we find (Hutchinson's Code, 927,) that that court was clothed with very full authority in such cases. They had power, upon the reversal of any judgment or sentence, to render such judgment or pass such sentence as the court below should have rendered or passed, and the power to remand in *criminal* as well as in civil cases, where there is anything *uncertain* in the judgment or sentence, is also given in very broad and general terms. We think, therefore, the court in this case rested their action, not upon the supposed possession of any inherent or common law powers to that end, but upon statutory authority well understood and recognized in that state.

The other case is that of *Beale v. The Commonwealth*, 1 Casey, 11, decided by the Supreme Court of Pennsylvania, in which the opinion was delivered by C. J. Lewis, from which Woodward, J., dissented. To understand what weight, as

authority, justly attaches to this case, we must first look to the antecedent decisions and legislation on this subject in that state. It appears that in the course of the argument in *Drew v. The Commonwealth*, 1 Whart., 279, which took place in 1835, Rogers, J., referred to a recent case, in which he said the Supreme Court had decided that where the indictment was good, and the trial good, that court would do what the court below would do after a new conviction, viz., sentence the party *de novo* and aright. In the following year, 1836, the legislature gave express power to the court "to examine and correct any and all manner of errors of the justices, magistrates and courts of the commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon to reverse, modify, or affirm such judgments and decrees or proceedings as the law shall direct." After this came the case of *Daniels v. The Commonwealth*, 7 Barr., 371, in which the opinion was delivered by Rogers, J. In that case this statute is set out, and the court say that by it, "in addition to the power to reverse or affirm heretofore given, we have authority to modify the judgment—that is, to change its form, vary or qualify it, and this as well in criminal as in civil cases.

It would certainly be better if the court had power also to remit the record, but as this is not given by the act of 1836, we must examine the sentence, and do right and justice according to circumstances," and, accordingly, acting under the statute, the court struck out the words "hard labor" from the sentence, and affirmed it in other respects. It appears to us the court in that case clearly decided they had no power to remand the record, and that their only power to modify the sentence was derived from the statute. Then comes the case referred to, of *Beale v. The Commonwealth*, in which C. J. Lewis says: "The doubts which formerly existed respecting the power of the Supreme Court upon reversing a judgment in a criminal case, are entirely dissipated. We have authorities to show that the Supreme Court, on reversal of a judgment in a criminal case, for error in the sentence, has power to pass such sentence as the court below ought to have passed." For this position, *Drew v. The Commonwealth*, and *Daniels v. The Commonwealth*, are first cited. What these cases, and especially the latter, decide, respecting this power, and whence it was derived, has been stated. Two other cases, *Commonwealth v. Ellis*, 11 Mass., 465,

and *Kane v. The People*, 8 Wend., 211, are also added in the same citation. These we have examined, but are unable to perceive that they have any bearing upon the propositions stated. We have fully shown what the Massachusetts and New York decisions on the question under consideration actually are, and, as respects them, there can, we think, be no doubt. He then says: "It has also the power to award a *procedendo* in a criminal case." For this, *Rex v. Kenworthy*, 1 B. and C., 711, is cited, and that case the subsequent English decisions have declared was one in which no judgment was rendered in the court of original jurisdiction. That case is, therefore, no authority for the position that a *procedendo* can be ordered after a reversal of a judgment in a criminal case, for error in the sentence itself. He then adds, "and it may, in its discretion, remit the record, with orders to proceed on the indictment after the reversal of an erroneous judgment." For this, *Commonwealth v. McKisson*, 8 Serg. and R., 442, and *Commonwealth v. Church*, 1 Burr., 110, are cited. These were cases brought up by the state, from judgments quashing the indictments, and the court reversed the quashing orders, sustained the indictments, and remanded the cases to the circuits, that the parties might be tried under them. There the parties had never been tried, and no judgments had ever been pronounced against them. If nothing more was meant to be asserted by the proposition than was decided in these cases, we have no occasion to quarrel with it. A large number of cases in this and other states might be cited to the same effect. But he then says: "The act of 16th of June, 1836, conferred no new powers in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions." If, however, the court, in *Daniels v. The Commonwealth*, did not decide that this act conferred a new power upon the court as to their control over judgments in criminal cases, they were certainly unfortunate in the language they there use, or we are unfortunate in being unable to comprehend it. Nor have we been able to find in the published reports any anterior conflicting decisions from which doubts, as to the power of the court in such cases, would have arisen. We may have overlooked them, or the reference may be to some unreported and unpublished decisions of that character. But certain it is that, neither in the title, preamble nor other parts of this act, is there any reference to such doubts or conflicting decisions. Such

reference or recital is frequently, if not usually, made in statutes passed for such purposes. The learned chief justice, for whose abilities and well earned reputation we have great respect, then proceeds thus:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence. If this court sanctioned such a rule it would fail to perform the chief duty for which it was established. Our duty is to correct errors and to minister justice. But such a course would perpetuate error and produce the most intolerable injustice."

But to these propositions we cannot yield assent. No such doctrines have ever been announced by the tribunals that for centuries have made, interpreted and administered the common law. On the contrary, the courts of England, in administering justice in criminal cases have, save in rare and exceptional instances, been watchful of the liberties of the subjects, and have taken care they should not be oppressed by the crown. Their doctrine has been that men must be punished according to the law of the land, and that to punish them otherwise is tyranny. It would, we think, be a startling novelty to the great judges of the English courts, to be told that it is monstrous and intolerable that a party should escape punishment, who has been duly convicted of crime, but upon whom a sentence has been imposed which the law does not authorize. From the many cases wherein they have made decisions that have led to that result, we infer they have regarded such escapes as less fraught with evil consequences than for courts to attempt to *usurp authority*, in order to inflict punishments. The decision which we have thus examined at length is, in our judgment, exceptional, and in conflict with the whole current of authorities, both in England and in this country. We cannot adopt or follow it, and shall not exercise any such powers unless they are conferred upon this court by the legislature. Is there any law which has given this court the power to pass a proper sentence in this case, or to remand it to the criminal court for that purpose? We know of none. The fourteenth and sixteenth sections, of article five of the Code, have no application to such cases. They give the court no power to modify criminal sentences, or to direct them to be modified by the infe-

rior courts: The same provisions were in force when *Watkins v. The State* was decided, and in that case this question was fully argued. The reversal of that judgment without a *procedendo* is conclusive of it. Whether the plaintiff in error, by thus requesting and obtaining his discharge from this indictment, has waived the protection which the law provides against a second jeopardy, so that he can be re-indicted and retried on the same charge, as has been suggested by some jurists and text writers, is a question we are not now at liberty to decide. It has not been argued on either side by counsel, and we should be stepping far beyond the line of duty, if not committing a grave impropriety, in now expressing any opinion upon it. We can only say, with C. J. Shaw, in *Christian v. The Commonwealth*, that, "whatever other remedy the state may have, it is not competent for this court to pass a new sentence upon this prisoner, nor to remit the case to the criminal court." Our power is limited to a simple reversal of the judgment.

Judgment reversed.

Decided June 16th, 1876.

COMMONWEALTH v. FOSTER.

(122 Mass., 317.)

PRACTICE: *Erroneous sentence.*

An indictment contained four counts, and a general verdict of guilty was returned. The court sentenced the defendant on the first two counts, and made no order continuing the case for sentence on the other counts. Afterwards, and at a subsequent term, the judgment not having been reversed, and the defendant, being imprisoned under it, was brought from prison on a *habeas corpus* and a fresh sentence imposed on him for the offense charged in the third count: *Held*, that the last sentence was erroneous and void. There can be but one judgment upon an indictment, and consequently a judgment and sentence upon one count definitely and conclusively disposes of the whole indictment, and operates as an acquittal upon, or discontinuance of the other counts.

GRAY, C. J. At the February term, 1873, of the superior court in Suffolk, the defendant was indicted in four counts, appearing upon the face of the indictment to be for distinct offenses, and each of which charged him with uttering and publishing as true a false, forged and counterfeit promissory note. The notes described in the first, second and fourth counts were

payable to the order of the respective makers, and were not alleged to be indorsed by them. The note described in the third count was payable to the order of the defendant, and no objection is made to the sufficiency of that count. The defendant pleaded not guilty, and the jury returned a general verdict of guilty. Exceptions alleged by the defendant to the rulings at the trial, not affecting the validity of the indictment, were overruled by this court in November, 1873: *Commonwealth v. Foster*, 114 Mass., 311.

At December term, 1873, of the superior court, to which the indictment had been continued, the defendant was sentenced upon the first count to imprisonment in the state prison for five years, and upon the second count to a like imprisonment for five years, to take effect after the expiration of his sentence upon the first count, and to stand committed until removed in pursuance of his sentence. Upon that judgment and sentence, the defendant, in June, 1876, sued out a writ of error, returnable at the September term, 1876, of this court. The attorney-general pleaded *nullo est erratum*, but now admits that that judgment is erroneous and must be reversed. See *Commonwealth v. Dullinger*, 118 Mass., 439. At the December term, 1876, of the superior court, the indictment was brought forward by order of the court, upon motion of the district attorney, and was continued to the January term, 1877, when the defendant was brought by writ of *habeas corpus* from the state prison, and, being set at the bar to receive sentence upon the third count, moved in arrest of judgment that, it appearing by the record that judgment had been entered upon this indictment at the December term, 1873, and the defendant had been thereby sentenced to imprisonment in the state prison, and was now serving out such sentence therein, and the judgment had not been reversed, although a writ of error to reverse it was pending, the court could not enter up any new judgment on the same indictment. The court overruled this motion, and passed sentence on the defendant, upon the third count, of imprisonment in the state prison for six years and nine months, to take effect after the expiration of the sentence passed upon the first and second counts. To this ruling and sentence the defendant alleged exceptions. The records of the superior court show no other order relating to this case. But the usual general order was made at the end of the December term, 1873, and of each succeeding term down to December, 1876, "that all

matters and things not acted upon stand continued, judgment is entered up and the court is adjourned without day."

By our law, several offenses of the same general nature, and punishable in the same manner, may be joined in one indictment; and, in case of a general verdict of guilty upon all the counts, the sentence may be either entire upon the whole indictment, or distinct upon each count, and to take effect upon the expiration of a previous sentence, and a defect in one count does not invalidate the sentence upon others: *Josslyn v. Commonwealth*, 6 Met., 236; *Kite v. Commonwealth*, 11 Met., 581; *Commonwealth v. Costello*, 120 Mass., 358; *Commonwealth v. Brown*, 121 Mass., 69. This case presents the question, whether a defendant, who has been found guilty generally upon an indictment containing several counts for distinct offenses, and has been sentenced, on some of the counts, to imprisonment, and has been imprisoned under such sentence, can, at a subsequent term, be brought up and sentenced anew upon another count in the same indictment.

No precedent in support of this mode of proceeding in a criminal case has been produced. It was contended, in the learned argument for the commonwealth, that there is no distinction in this respect between criminal and civil cases; and that in a civil action, if the declaration contains two counts for distinct causes, judgment may be rendered upon one, and a writ of error sued out upon such judgment, and the matter of the other count be afterward tried and determined, and judgment rendered upon it. Reference was made to two early English cases, which, upon examination, do not appear to us to establish any such general rule.

In the first of those cases, in the 36th year of Henry VI., on a writ of entry *sur disseisin* in the common bench, to recover certain land and rent, the issue as to the land was tried and found for the demandant, and, while the rent yet depended in plea, the demandant had judgment to recover the land and damages therefor, and prayed for a *fiery facias*, returnable presently, and had it, and the sheriff returned *fiery feoi*. "Littleton prayed that the moneys might be delivered to the defendant, and that he might have a *supersedeas* to the sheriff until the plea be determined, for before that the plea be wholly determined he cannot have a writ of error, because it is one original." Prisot, C. J., said: "In debt against two by divers præcipes, if there be error in a

judgment against the one, he shall have a writ of error, and yet the original is here; for, in those originals, in which there are divers counts, and there is error against the one, he shall have a writ of error and the record of his count, and the plea shall be severed from the original and removed into the king's bench, and yet the original remains here. But where there is one original and one count, he cannot have a writ of error, for the writ and the record cannot be in the king's bench and also here. But bring us a special writ of error, if you will, and we will advise, when we see the writ, whether it shall be allowed or no:" Fitz. Ab., *Fieri Facias*, Pl., 3.

Of that case it is to be observed: 1st. The opinion of the court, upon the question whether the tenant should seek relief from the judgment and execution for the land and damages, by a *supersedeas* of proceedings until the matter of the rent should be determined, or by suing out a writ of error immediately, was reserved until a special writ of error should be presented. 2d. The dictum, as to "debt against two by divers præcipes" had in view the case of several præcipes against different persons for different claims, which, though apparently permitted by the practice of that time to be joined in one original writ, were really equivalent to two originals, and were so regarded: Reg. Brev., 139, a; Vin. Ab. Præcipe, *quod reddat*, F. Pl., 6, 7; Com. Dig. Pleader, 3 B., 7; as in the case in which our practice act allows parties having different liabilities upon one written contract to be joined in one action, with several counts and several judgments: Gen. Sts., c. 129, sec. 4; *Hawkes v. Phillips*, 7 Gray, 284; *Wamesit Bank v. Buttrick*, 11 Gray, 387; *Colt v. Learned*, 118 Mass., 380. 3d. In the same court, two years earlier, on a *quare impedit* against the bishop, the pretended patron and his clerk, on which, before the plea of the bishop was determined, judgment was given against the others, and they undertook to sue out a writ of error, the opinion of the court is thus reported:

"*Prisot et tota curia*. It cannot be; for a writ of error recites all those names which are party to the original writ, and then it says, *et si judicium inde redditum fuerit tunc recordum illud habeatis*; wherefore, that proves that it cannot be removed before that the whole matter be determined:" 34 Hen. VI., 11, 38, 41; S. C. Fitz. Ab. Error, Pl., 35. The other case relied on by the commonwealth was decided in the 17th year of James

I., and was a *quo warranto* brought against Cusack and other aldermen of Dublin, pretending to be a corporation, and to have certain special privileges.

The court of king's bench in Ireland, as to the special privileges, gave judgment of seizure, ouster and fine; and, as to the question of corporation, *curia advisare vult*. The defendants brought the case, on writ of error, to the king's bench in England: *Case of the Corporation of Dublin*, Palmer, 1. At the first argument, Montagu, C. J., said: "They ought not to have given judgment for any part until they were advised of the whole, for a judgment ought not to be given by parcels;" and Doddridge, J., "as to that, held that, inasmuch as a complete judgment for this cause is not yet given, therefore the record is not removed, for the writ of error is *si judicium redditum est*, which must be intended a complete judgment:" S. C., *nom.*, *Le Roy v. Cusacke*, 2 Rol. R., 113, 116. But the court afterwards decided that the writ of error was well brought, and, being of opinion that there was no error, affirmed the judgment: Palmer, 5, 9; 2 Rol. R., 125.

These reports contain some *obiter dicta* that the court below might afterwards render judgment upon the matter not disposed of; but the only point adjudged, as best stated in another report of the case, in Chief Justice Treby's notes to Dyer's Reports (which, as observed by Buller, J., in *Milward v. Thatcher*, 2 T. R., 81, 84, are good authority), was "that the writ of error was well brought, for the judgment is *quod capiatur pro fine*, by which they shall be imprisoned; and if they shall not have a writ of error, they will be without remedy:" *The King v. Fraternity of Dublin*, Dyer, 291, b, Note. There can be no doubt that any judgment, on which a person is liable, and is, in fact, imprisoned, is such a final judgment as to entitle him to sue out a writ of error: *Bryan v. Bates*, 12 Allen, 201, 207.

Lord Coke treated the case of a judgment, under which a person suffers immediate loss or injury, as well as that of a judgment upon one of two several præcipes, as exceptions, depending upon the peculiar circumstances, to the general rule that a writ of error will not lie until the whole case is determined: *Metcalfe's Case*, 11 Rep., 38 a, 39 a, 41 a; S. C., *nom.*, *Wood v. Medcalfe*, 1 Rol. R., 84, 85; *Metcalf v. Wood*, Cro. Jac., 356. We have not been able to find any English case within the last two centuries, in which a writ of error has been maintained

in a civil action, before all the counts were disposed of. On the contrary, it seems to be now established, that a writ of error cannot be brought by the defendant, before judgment upon all the counts; nor by the plaintiff, until all the pleas have been disposed of, even if there has been judgment for the defendant upon a plea which goes to the whole cause of action: *Samuel v. Indin*, 6 East., 333; *Beckham v. Knight*, 7 Scott, 346; S. C., 7 Dowl., 409; *Tolson v. Kuye*, 6 Man. and Gr., 536; S. C., 7 Scott N. R., 222.

In this commonwealth, if a declaration contains several counts for distinct causes of action, and the jury return a verdict upon one and disagree as to the other, final judgment is not rendered, nor can the rulings upon the first count be revised by appeal or bill of exceptions, until the other counts have been disposed of: *Hall v. Briggs*, 18 Pick., 503; *Case v. Ladd*, 2 Allen, 130; *Harding v. Pratt*, 119 Mass., 188. To the same effect are *Pett v. McGraw*, 21 Wend., 667, and *United States v. Girault*, 11 How., 22, 32.

Under a statute allowing the government to sue out a writ of error "to review any judgment rendered in favor of any defendant upon any indictment," except in case of his acquittal by the jury, it was held by the court of appeals of the state of New York, that a writ of error could not be brought on a judgment in favor of the defendant upon a demurrer to one count, while an issue of fact upon another count was still pending: *People v. Merrill*, 4 Kernan, 74.

By the law of England and of this commonwealth, when a verdict of guilty has been returned upon one count of an indictment, the defendant may be lawfully sentenced thereon, although no verdict has been returned upon another count: *Latham v. The Queen*, 5 B. and S., 635; S. C., 9, Cox C. C., 516; *Edgerton v. Commonwealth*, 5 Allen, 514. In *Latham v. The Queen*, it was indeed said that the counts were, to all intents and purposes, separate indictments, and the defendant might afterwards be tried on the second count; but this point was not before the court. On the other hand, in *Edgerton v. Commonwealth*, this court was of opinion that there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitely and conclusively disposed of the whole indictment, and operated as an acquittal upon, or discontinuance of, the other count. And the same view has been

affirmed by decisions in other states: *Guenther v. People*, 24 N. Y., 100; *Girts v. Commonwealth* 22 Penn. St., 351; *Weinzorpflin v. State*, 7 Blackf., 186; *Stoltz v. People*, 4 Seam., 168; *State v. Hill*, 30 Wis., 416; *Kink v. Commonwealth*, 9 Leigh, 627; *Nabors v. State*, 6 Ala., 200; *Morris v. State*, 8 Sm. and Marsh, 762.

We have no doubt that this is the true view, and that the same principle applies to a case in which a verdict of guilty is returned upon all the counts, and sentence is passed upon some of them—especially where, as in the present case, all the counts are against the same person, and no special order is made at the term at which the judgment is rendered, continuing the case for further proceedings. The sentence upon the first two counts, though erroneous and liable to be reversed by writ of error, yet, having been rendered by a court which had jurisdiction of the party and of the offense, on a verdict returned in due form, was not absolutely void: *Commonwealth v. Lord*, 3 Met., 328; *Kite v. Commonwealth*, 11 Met., 581, 585; *Ex parte Lange*, 18 Wall., 163, 174. The sentence might have been amended at the same term, and before any had been done in execution thereof; *Commonwealth v. Weymouth*, 2 Allen, 144. But after the defendant had been imprisoned under it, and the term had been adjourned without day, the court could not amend it, or set it aside and impose a new sentence instead: *Rex v. Fletcher*, Russ. and Ry., 58; *Brown v. Rice*, 57 Maine, 55; *Commonwealth v. Mayloy*, 57 Penn. St., 291; *Ex parte Lange*, above cited. This is not like a case in which the indictment has been ordered by the court to be laid on file, without any judgment against the defendant, as in *Commonwealth v. Dowdican's Bail*, 115 Mass., 133. The result is, that it was not in the power of the superior court, after having rendered one judgment and sentence against the defendant, upon which he had been since imprisoned, to order, at a subsequent term, that the case should be brought forward and another sentence imposed.

Exceptions sustained.

STATE V. LAPAGE.

(57 N. H., 245.)

PRACTICE: *Evidence—Character of respondent—Vicious disposition.*

The prosecution cannot attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character.

The prosecution cannot show the defendant's bad character by showing particular acts.

The prosecution cannot show in the prisoner a tendency or disposition to commit the crime with which he is charged.

The prosecution cannot give in evidence other criminal acts of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions.

From Merrimack circuit court.

Indictment, charging the respondent with the murder of Josie A. Langmaid, who was killed October 4, 1875, about nine o'clock in the morning, while passing over the academy road, in Pembroke, on her way to school. Her head was severed from her body, and removed a distance of a quarter of a mile. Another part of her body, including one-half or two-thirds of the vagina, was cut out and carried away, and was never recovered. No *post-mortem* examination of the body was made, with a view to ascertaining whether the victim had been violated.

The government claimed that the murder was committed "in perpetrating or attempting to perpetrate rape."

As tending to show that the prisoner had an intent to commit such a crime, and that he was making antecedent preparations therefor, the state was permitted to show, by one Clarence B. Cochran, that on October 1, about half-past eight o'clock in the morning, as he was passing along the academy road on his way to school, when he arrived within about thirty rods of the place of the murder, he saw a man jump into the bushes on the side of the road. He testified: "I only saw him pass into the bushes. He passed into the bushes, springing, as if in haste." He did not recognize the man.

Adin G. Fowler was permitted to testify to conversations with the respondent, on September 24, 25 and 26, as follows: I was to work out in front of the house on that night (September 24)

sorting potatoes. Mr. Lapage came out and took hold and helped us for a few moments; and while we were to work there my sister came home. A gentleman brought her home, and she got out of the wagon and went into the house; and Mr. Lapage wanted to know who that was, and I told him; and he wanted to know then if she had been to Suncook. I told him no, she had been to school. Then he wanted to know which way she went to get there, and I told him, as well as I could, how to go, and pointed out toward the academy, that way (pointing), and he said that that must be the same way that he came when he came out to Mr. Kimball's; and that was all that was said that night.

* * * * *

The next night—Saturday night—I went to carry him part of the way home. I carried him down Buck street as far as the house of Mr. Locke, and when we got down to Russ's corner he wanted to know then if there is where my sister went to school. I told him no, and pointed out toward the academy again, and told him two miles, or a mile and a half—I don't remember exactly, but I believe I told him a mile—"and then turn to your right and go up." And that was all that was said that night.

* * * * *

Saturday I carried my sister on the street, and left her there at a place where she roomed. Then I went to Suncook and got Mr. Lapage, to bring him out. * * We came down Buck street. * * When we went past there (the academy road) I remember of telling that that is the road my sister went on when she went to school.

Edward L. Mahair testified that he saw the respondent while he was at work for Mr. Fowler, threshing. While thus occupied about a week before the murder, a young lady passed by.

* * * * *

When the girl passed by he was threshing in the barn, and he spoke to me and asked me where that gal was going. I told him I didn't know. Then he asked me what her name was. I told him her name was Sarah Prentice. Then he wanted to know where she lived. I told him—went to the door, and showed him as near as I could. * * * Then he wanted to know who was going with her. I told him I didn't know. And that is all he said that day. * * I was up there the next day, and was going through the barn, and he stopped me, and said, "Where did that gal go that went down by?" I told him I didn't

know whether she went into Mr. Fowler's or went further. He wanted to know who went with her. I told him I couldn't tell him ; I didn't know who went with her. Then he asked me who she was and where she lived, again, and I showed him ; and then the next time he asked me who went with her, I told him I didn't know. He said he wondered which road she went on the most. I told him, "I guess she goes on this road the most."

The witness then repeated an obscene and vulgar remark and inquiry made by the respondent concerning the girl.

Hiram Towle, and Harriet A. N. Towle, his wife, testified, in substance, that on Saturday, October second, about nine o'clock A. M., they were riding over the Academy road, and when about fifty or sixty rods from the place of the murder, they met the respondent carrying a stick behind him. The stick was described as being similar in all respects (about three feet long, four-sided, about one and a quarter inches square, whittled at one end for a handle) to a stick produced in court, which had been found, broken and stained with blood, near the place of the murder.

Alversia Watson testified as follows: I live in Allentown. Have a son and two daughters ; my youngest daughter is attending school at Pembroke academy ; did not attend school last fall, but taught in Hooksett ; I go over Chester turnpike to get there ; she came home Friday nights, and went back Sundays ; first part of term she walked ; I went with her—generally went about a mile and three-quarters. Saw Lapage on that road once, in the last part of September, on Sunday ; saw him standing about a mile from my house beside the road, opposite some bushes ; my daughter was with me ; noticed nothing in his hands when I first saw him. Saw him again about half a mile further on ; he was coming towards me ; this was two weeks before I heard of the murder ; he had something in his hand the second time I saw him ; it was a stick, or cane ; think that the stick was a newly cut stick ; think it was larger than the stick found in the woods of the murder ; had it in his right hand. The second time I saw him he was coming along behind me, about a hundred feet ; I watched him by looking behind me ; was about twelve feet away when I last saw him ; he was moving rapidly toward me, partly running ; my daughter was very much frightened, and was crying ; it was between four and five in the afternoon when I saw him the first time ; saw him next time half a mile further on in the road, following on after me ; had been

further. He
I couldn't tell
asked me who
him; and then
I told him I
he went on the
the most."
er remark and
el.

fe, testified, in
t nine o'clock
d when about
they met the
k was described
ng, four-sided,
one end for a
been found,
he murder.

n Allenstown.
nter is attend-
chool last fall,
npike to get
ick Sundays;
enerally went
at road once,
him standing
pposite some
g in his hands
a mile further
eeks before I
d the second
the stick was
ick found in

The second
about a hun-
e; was about
oving rapidly
much fright-
in the after-
t time half a
e; had been

walking; turning to look at my daughter, saw a man picking berries on top of a hill; when I turned to look at my daughter, saw Lapage going into the bushes; went about half a mile further with my daughter; sat on top of the hill till I thought my daughter had got out of hearing—about fifteen minutes, I think; George Mack (the man who was picking berries) waited, and came home with me. The person I met with a club was Lapage, the prisoner.

Cross-examination. My daughter and I were going to Hooksett; it was on Sunday; it is four miles from my house to where she taught school; went with her about two miles; there are chestnut woods along the road; first saw the man about a mile from home, he was just outside of the road; he was about fifty feet away then, standing still; did not see him again until I had passed the place, and turned back and saw him again; he stood still till I passed out of his sight by a turn in the road; it was two or three minutes' walk before I got out of sight of him; went with my daughter more than a mile; went nearly half a mile before I saw him again; he was coming in the road; could have seen a man quite a little distance; when I saw him last he was partly running towards me, and came to within a few feet of me; saw the man picking berries there, near Lakin's shanty, a short distance away; saw no one else but Mr. Mack's little boy; the man with the stick went into the woods on the opposite side from where Mr. Mack was. The man I saw was not very tall, with black whiskers, tan-colored overalls, and gray mixed coat. Wore a dark hat. Next saw the man in jail; can't tell when; went there at the request of Mr. Hildreth; he mentioned no name of any one at the jail, but wished me to go and see if there was any one there that I had seen before. Mr. Hildreth, Hattie Gault and some others went to the jail with me; Mr. Sargent asked me to go and look in every cell and see if there was any one that I had seen there; went in, and when I saw Lapage, knew him at once by his looks and features; did not notice Lapage's moustache when I met him in the road; don't think his beard was as long in jail as when I saw him in the road.

Re-direct. My attention was called to some clothing at the jail, and I picked out a coat that I thought was like the one he wore. (Coat shown, and thought to be the same by witness.)

Matthias Mercy testified as follows: I know Annie Watson; saw her on Chester turnpike one Sunday last September; saw

her about two and a half or three miles from Suncook saw-mill; was in the road when I met her; had not seen her before; said nothing to her; sat down on a rock beside the road; saw Lapage while I sat there; I knew Lapage before; he was running towards the girl; when he came up to me he faced towards me; his face was red and excited; he had been running half a mile, and more too; he never said anything to me; he looked right towards her; he slacked up a little, and then started off on a run; don't know whether he saw me or not.

Cross-examined. I had seen Lapage before I saw him in the road; saw him in his house in Potter's block; saw him in the road on Sunday—the last Sunday in the month; saw a man and woman that day; their names were Palmer; they live in Allentown; saw them when I was going up, and the girl when I came back; went up as far as Lakin's hill, turned, and came back; it is about two miles from Suncook to Lakin's hill; saw Lapage as I was coming back from Lakin's, about five o'clock at night; met the Watson girl the other side of Lakin's hill; I walked about a quarter of a mile and sat down; heard Lapage running in half a minute; saw Lapage walk up the hill, and begin to run when he reached the top; this was after he passed me.

Anna A. Watson testified that she was the daughter of Mrs. A. Watson, and taught school in Hooksett last September; came home Friday nights and returned Sunday nights, usually. On Sunday night, a fortnight before Josie Langmaid was killed on Monday, she met two persons on the road; met T. Marcy on the road; she and her mother were followed by a man that Sunday; he was in the bushes, partly bent over, and she noticed he had dark whiskers. As they were going up the hill by a shanty she looked back and saw the man again, coming after her, some ways from where she first saw him, and he was on the side of the road, as near as across this room; he had a stick in his hands, traveling fast; he was walking, and he nearly overtook us. She was so frightened that she thought she would go up the hill as soon as possible, and in a few minutes she saw Mr. Mack; the man disappeared in the woods, and she did not see the man; he went into the woods again; after her mother left her she ran; she could not identify the man, she was so frightened at the time.

Julienne Rousse testified that she resided in Joliet, Canada, and was a sister of Joseph Lapage's wife, and knew him; saw

him last four years ago last June, before seeing him in Concord; saw him at her home in Desier Marion.

Went to a pasture to milk cows while living at St. Beatrice, Canada, and met Lapage there; when I arrived at the pasture the cows were not there; Lapage was above in the pasture, with a buffalo robe mask on his face, a home-made faded red shirt, and pair of linen pants, with a leather belt around him, and a pine root in his hand the size of her arm, and about three feet long; he was four or five rails from her. A rail is ten feet; the place was not in sight of any house; it was seven o'clock in the morning, June, 1871; he tried to catch her; she shouted and tried to run away; after she had gone four or five rails he overtook her, caught hold of her, and she turned round and pulled the mask off him and recognized Lapage by his face; he then rolled his head into her skirt and tried to choke her. After he choked her she turned on her belly, and then he rubbed coarse sand into her eyes and mouth; after she was choked and lost her strength he outraged her; lost her strength and mind, and did not know when he left her; she was gone two hours before she reached the house, which was ten acres away, or about one-third of a mile; he did not strike her with the stick, but committed rape upon her; after coming to, she went to her home. He choked her throat with his hand, which left black marks upon her throat. The marks were upon her throat for a month, and her neck was very black where his fingers were, and for a month she had great difficulty in eating and drinking; was twenty-seven years old, and never married; Lapage was married at that time, and lived twenty-five or thirty acres from her home; saw Lapage the next day, but had no conversation with him; was living with a Mr. Marion then; had never seen or spoken to him since; he went to the United States at once.

Cross-examined. First talked of the outrage upon her to Joseph Lajeunesse and his daughter, the same day at nine o'clock, they being at Marion's house at the time. Three children of Marion, the oldest seven years old, and Lajeunesse's family, were the only ones in the house; couldn't tell where the Lajeunesse family now lived, except that it was in a place called Acton; they left St. Beatrice three years next March, she thought; next talked of the outrage with Mr. Marion and his wife, at three o'clock the same afternoon; employed no doctor for her injuries; Lapage first seized her by the throat. After

she was down on the ground, he grabbed her by the back to throw her down, and attempted to commit the outrage, when she screamed, and he seized her throat. He turned her over after he choked her, and this was after the sand was put into her eyes and mouth, at which time she was sensible; but she lost her senses when he committed the outrage, and did not know when she recovered her senses, but was gone two hours before she got back to the house. She pulled the mask off so far as to see his eyes, and she knew the man before she pulled the mask from him. The mask was tied with two black strings, and she pulled it down so she saw his forehead; had a hat on when she first saw him, and when she grabbed his mask his hat fell off. He tried to murmur a few words of English, so as to disguise himself. She understood that Lapage knew that she knew him, and so tried to disguise himself by attempting to talk English. She had no talk with him, but screamed; Lapage had a farm, and worked on it, which belonged to Edward Perrault. Spoke to Edward Perrault about the outrage upon her. She asked him if Lapage was at home, and he said he was not, but had started for the States. She never said to Perrault that she did not know who it was that assaulted her, and had no conversation with him about the outrage.

To the admission of all the foregoing testimony the respondent excepted.

Hattie M. Gault testified as follows: Lived on Pembroke street, a half mile this side of the academy, and attended that school October 4, and reached the school about 8.30 that morning; bells rung at 8.25 and 8.55 o'clock; stood in the door of the academy and saw Lapage pass the building, and was as confident of it as she could be; he had an axe on his shoulder, and turned down the academy road, and she watched him as far as she could see him on that road. Next saw him at the jail, and identified him as the man who passed the academy.

Concerning the foregoing evidence, the court charged the jury as follows:

"You have heard the testimony of Julianne Rousse to the effect that in June, 1871, this prisoner committed a rape upon her. In considering this evidence (if you believe the witness), you will be required to use careful discrimination of the way and manner in which it is to be applied to this case, if it is to be applied at all.

"We have admitted the evidence, not because it is *necessarily* connected with the issue which you are to try—which is the guilt or the innocence of the prisoner of the offense with which he is *here* and *now* charged—but because it *may* have a legal bearing upon that issue in the way which I shall endeavor to explain, and to which I invite your most careful attention. It may be your duty to reject the evidence entirely, and put it out of the case and out of your minds. It may be your duty to consider it. It is a fundamental principle of law that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense. This principle we must take care not to violate; and, therefore, you are not to regard the evidence of Julianne Rouse as any proof or evidence that the prisoner killed Josie Langmaid. Therefore, unless you find from *other* evidence, entirely independent of that of Julianne Rouse, that the prisoner killed and murdered Josie Langmaid, you must reject her evidence altogether.

"The evidence is open to your consideration, if at all, only so far as it may seem to you to bear upon the *character* of the homicide of Josie Langmaid; only as it may bear upon the question whether she was murdered by the prisoner in perpetrating or attempting to perpetrate rape.

"Our statute declares that 'All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in attempting to perpetrate arson, rape, robbery or burglary, is murder of the first degree; and all murder not of the first degree is murder of the second degree.'

"And if the jury shall find any prisoner guilty of murder, they shall by their verdict find also whether it is of the first or second degree.'

"If you find, from other evidence in the case than that of Julianne Rouse, that the defendant killed Josie Langmaid deliberately and premeditatedly, or in perpetrating or attempting to perpetrate rape, you may, and your duty is to reject her testimony altogether. But if you are not so satisfied by all the other evidence and circumstances of the case, you may consider her evidence. I need hardly say that you must be satisfied upon this point, that the prisoner is the man who committed the rape upon Julianne Rouse.

"The evidence, you see, therefore, bears only upon the question of the *intention* of the prisoner in killing Josie Langmaid,

and thus upon the *degree* of guilt, *i. e.*, whether the offense is murder of the first or second degree.

"Now, 'the unlawful intent in a particular case may sometimes be inferred (not necessarily, but it *may* be inferred) from a similar intent proved to have existed in previous transactions.'

"The principle upon which such evidence is admitted is that, 'though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet, whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible.'

"If, in this case, you find it necessary to show the commission of, or the attempt to commit a rape upon Josie Langmaid, in order to find the prisoner guilty of murder in the first degree, and the evidence of the mutilation and concealment of the private parts of her body are not sufficient to satisfy you of that fact, then you may inquire what other motive induced him to kill her.

"Does the testimony of Julianne Rousse, or any other evidence in the case, tend to show the existence in the mind of the prisoner of a motive or passion which would render the commission of, or an attempt to commit a rape upon Josie Langmaid, more probable than it would otherwise seem to you? Does it or not tend to show that such a lustful intent existed in the heart of the prisoner at the time as would render the commission of a rape more probable? Does this evidence supply a motive for the commission of the offense?

"The crime committed upon Julianne Rousse was four years and more antecedent to the offense under consideration. Since that time a change may have taken place in his mind. There has been time for repentance, and the lustful disposition he bore then may have been eradicated. The more remote the evidence of this mental condition, the less force and weight belong to it.

"But in connection with this part of your inquiry, *i. e.*, concerning the present intention, and whether a lustful disposition still remained in the prisoner's heart, you may consider the evidence of Adin G. Fowler, of the prisoner's inquiry on three different occasions concerning Fowler's sister, and where she went to school, and the road she took to get there (within a fortnight

of the murder); of young Mahair concerning Sarah Prentice, the way she traveled, and the obscene remark concerning her; of Mrs. Watson, her daughter Anna, and Matthias Mercy, concerning his pursuit of Anna about two weeks before the murder.

"And here it is proper to remark, that if the prisoner killed Josie Langmaid, it is not at all necessary that any lustful desire or any animosity toward her *in particular* should be shown, provided she became the victim of his lustful and murderous intent. If the intent to commit rape and murder upon some one else, or upon any girl whom by chance he might encounter, was consummated in an attack upon Josie Langmaid, the indictment is sustained."

No exceptions were taken to the charge.

The respondent was convicted of murder in the first degree, and sentenced to be hanged.

The respondent tendered this bill of exceptions, which was allowed; and, in transferring the same for the consideration of the superior court, the circuit court reserved and transferred all questions as to the exercise of discretion. Transferred by Foster, C. J., C. C., and Rand, J., C. C.

Lewis W. Clark, attorney-general (with whom were *W. W. Flanders*, solicitor, and *C. P. Sanborn*), for the state.

There were two questions for the jury: 1st. Was the defendant the person who killed the deceased? 2d. If he was the slayer, did he kill her in perpetrating or attempting to perpetrate rape? No exceptions were taken to the charge. Under an unexceptionable charge, and upon other testimony than that of *Julienne Rousse*, the jury have answered the first question in the affirmative.

I. The only question of law raised by the bill of exceptions is, whether the evidence objected to is admissible for any purpose. Does this evidence have a legal tendency to show that the defendant killed the deceased, or that he intended to commit a rape upon her?

The burden was on the state to prove the first degree of murder. Unless the state proved that degree beyond all reasonable doubt, the defendant could not be found guilty of that degree. The degree was as distinct and separate a point to be proved by the state as the fact that there was such a person as *Josie Langmaid*, the fact that she is dead, the fact that she died a violent death, the fact that her death was not accidental, the fact that

she did not commit suicide, or the fact that the defendant is the person who killed her. In cases of this kind we are apt to lose sight of the wide gulf between the proved homicide, and the necessity of proving the degree of it. We are apt to take it for granted that such a homicide as this apparently was, was a murder of the first degree; that there is no need of any evidence on the question of degree, and that the jury will find the first degree if they find homicide. And when we infer the degree from the sex and age of the deceased, and the peculiar mutilation of her person, we are apt to confound the duties of court, counsel and jury; to presume that the jury must draw the same inference that we draw, and to think that counsel need not offer, and that the court may safely reject, all distinct and independent evidence on the question of degree. But counsel cannot argue here, and the court cannot hold, that as matter of fact the jury must have found the first degree from the evidence of sex, age and mutilation. That is a question with which we here have nothing to do. The only question of law here is, whether the evidence objected to had any legal tendency to prove any material fact.

This evidence was cumulative—that is, it tended to prove a fact or facts which other evidence also tended to prove. All evidence, except the first scintilla, on every point, is cumulative; but all evidence, except the first scintilla, is not, therefore, incompetent.

If, at the trial, the court had believed that this evidence was superfluous, and was offered in bad faith, for the purpose of prejudicing the jury improperly on some other points than those on which it was offered, or that, on any other ground within the discretion of the court, it ought not to be received, the court would have exercised its discretionary power. But no cause for exercising that power appears here.

Had the evidence a legal tendency to prove any fact put in issue by the defendant's plea? One fact thus put in issue was his killing the deceased. Another fact thus put in issue was his killing her, not accidentally, not in self-defense, not under any of the great variety of circumstances, or for any of the numerous reasons that would make his homicidal act manslaughter or murder in the second degree, but in the commission of or the attempt to commit a rape, or under any other circumstances, or for any other reasons that would make his homicidal act murder

in the first degree. The state, asking a conviction, not for manslaughter, or murder in the second degree, were bound to satisfy, not the court, but the jury, not only that the homicide was committed by the defendant, but also that the homicide was murder of the first degree; and of this the state was bound to satisfy the jury beyond all reasonable doubt. The court could not instruct the jury that they were bound to find, upon the evidence received without objection, that the homicide was murder of the first degree; for error in such instructions the judgment would be reversed. Without the evidence objected to the jury might not have been satisfied, beyond all reasonable doubt, that the deceased did not die suddenly of heart disease, or did not commit suicide, or was not accidentally killed by a carriage running over her, or by a random gun-shot. In either case the dead body might have been found and mangled by some person who was innocent of her death. The defendant, or some other person, might have insulted her, or committed an indecent assault upon her; and, in the struggle that ensued the homicide might have been murder in the second degree, or voluntary or involuntary manslaughter. The state, being bound to remove from the minds of the jury every reasonable doubt on these and all other possible points involved in the charge of murder in the first degree, had a right to introduce evidence on those points.

Since the decision in *Darling v. Westmoreland*, 52 N. H., 401, 403, 405, 406, it cannot be necessary, in this state, to argue or to cite authorities to show that the evidence to prove several independent propositions or distinct facts may be of different kinds, and drawn from different sources; and that the rule requiring evidence to be confined to the point in issue, excluding evidence of general character and disposition, and prohibiting the trial of collateral issues, is merely the rule that requires evidence to be relevant, and excludes what is irrelevant; and when such evidence is admitted, it is admitted, not because it is evidence of character or disposition, or of such other transaction, but because the character, disposition, or transaction is relevant. Character, disposition, and certain innocent or criminal acts, not being the primary, express and immediate subject of the issue, may be relevant, that is, may have a legal tendency to prove a material fact involved in the issue. And they may be irrelevant. And because they are often irrelevant, and therefore inadmissible in evidence, it is often said that there is a rule of law that excludes

evidence of other crimes than that charged, and evidence of a general disposition to commit the same kind of offense. But the books abound in cases that show there neither is nor can be any such rule. What is often erroneously called a rule of that kind is merely the application to a particular case of the rule requiring evidence to be relevant. When certain evidence tends to prove the commission of another crime than that charged, or a general disposition to commit such or any other crime, the circumstance that the act or disposition, which the evidence tends directly to prove, is criminal, is wholly immaterial. The question is not whether it is criminal, but whether it is relevant—whether it has a legal tendency to prove a fact material to the issue.

Although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible. If the evidence offered tends to prove a material fact, it is admissible, although it may also tend to prove the commission of another distinct and separate offense: *Mason v. The State*, 42 Ala., 532, 537; *Kirkwood's Case*, 1 Lewin C. C., 103; *Com. v. Stearns*, 10 Met., 256; *Reg. v. Aston*, 2 Russ. on Cr., 841, 4th ed.; 3 *Id.*, 286; *Reg. v. Weeks*, Leigh and Cave C. C., 18, 21.

"The principle is, that all the evidence admitted must be pertinent to the point in issue; but if it be pertinent to this point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts:" *Com. v. Choate*, 105 Mass., 451, 458. In *Reg. v. Lewis*, Arch. Cr. Pl. (14th ed.), 486, Lord Denman "could not conceive how the relevancy of the fact to charge could be affected by its being the subject of another charge." Evidence of other crimes than the one charged is so frequently received on indictments for forgery and counterfeiting, and uttering forged or counterfeit papers or coins, that those classes of cases are sometimes erroneously spoken of as exceptions to the general rule of evidence. They are not exceptions. Evidence is received in all cases when it is relevant (unless it is rejected, on some ground of fact, by an exercise of judicial discretion) without reference to the question whether the facts proved are criminal or not. Its competency consists, not in the innocent character of the act which it tends to prove, but in the relevancy of that act to the issue. Evidence of other crimes is

more frequently received in cases of forgery and counterfeiting than in other cases, not because those cases are exceptional in law, but because, in fact, such evidence is more frequently available in those than in other cases to prove a material fact. It is admitted to prove the guilty knowledge, the motive, or the intent, not because there is any exception or special rule of law applicable to proof of the defendant's knowledge, motive, or intent, but because his knowledge, motive or intent is a material fact to be proved, like any other material fact, by relevant evidence.

The general rule of evidence that requires evidence to be relevant admits evidence that is relevant, and it is as applicable to murder as to passing counterfeit money.

In *Rex v. Voke*, R. and R., 531, it was held by all the judges, on the charge of shooting with intent to kill, that proof of shooting at the same person at another time was competent to show that the shooting charged was not accidental. In *Reg. v. Geering*, 18 Law Journal Mag., cas. 215, the charge was against a wife for the murder of her husband by poison. Evidence of three of her sons being subsequently poisoned was received, to show that her husband died of poison, and that his death was not accidental. In *Reg. v. Cotton*, 12 Cox C. C., 400, the charge was against a mother for murdering her child by poison. Evidence was held admissible to prove that two other children of hers, and a lodger in the house, had previously died of poison. In *Reg. v. Garner and Wife*, 3 F. and F., 681, the charge was the murder of Garner's mother by poison. His wife had lived in his family as a servant when his former wife died. His mother died of poison. Evidence was received to show that his first wife died of poison, and to show the circumstances of her death. In *Reg. v. Roder*, 12 Cox C. C., 630, on the trial of the defendant for murdering her infant by suffocation in bed, evidence was received tending to show the previous deaths of her other children at early ages. In *Rex v. Clewes*, 4 C. and P., 221, on a charge of murdering H., evidence was received to show that H. had been employed by the defendant to murder P. In *State v. Watkins*, 9 Conn., 47, on a charge of murdering the defendant's wife, evidence was received to show the defendant in adulterous intercourse with another woman for some months before his wife's death: *Johnson v. State*, 17 Ala., 618; *Hall v. State*, 40 Ala., 698; *People v. Stout*, 4 Parker Cr., 71. In *Com. v.*

Ferrigan, 44 Pa., 386, in a trial of murder, evidence was received to show an adulterous intercourse between the defendant and the wife of the deceased.

And the general rule applies to the killing of horses as well as to murder. In *Ree v. Mogg*, 4 C. and P., 364, on a charge of administering sulphuric acid to eight horses with intent to kill them, evidence of the defendant's administering it at different times was received to show his intent. And the same doctrine is held in all other classes of cases, as well as those relating to the destruction of life. In *Reg. v. Dossett*, 2 C. and K., 306, on a charge of setting fire to a rick by firing a gun close to it on the twenty-ninth of March, evidence that the rick was also on fire on the twenty-eighth of March, and that the prisoner was then close to it, having a gun in his hand, was received to show that the fire on the twenty-ninth was not accidental. On the question of accident, the evidence would have been relevant if it had related to another rick belonging to another person. On a charge of setting fire to the defendant's house, with intent to defraud an insurance company, evidence that the defendant had insured in other offices two other houses in which he had lived that were burned, and that he received the insurance money from the other companies, is relevant as tending to show that the fire in question was intended, and not accidental: *Reg. v. Gray*, 4 F. and F., 1102.

The question of accidental death in the present case was one upon which the state was bound to satisfy the jury beyond all reasonable doubt, and therefore one on which the state had a right to introduce evidence. Mere proof that the defendant killed the deceased would be perfectly consistent with murder in the second degree, or manslaughter, or the defendant's entire innocence. He might have killed her in self-defense, or accidentally, and without fault on his part. The state, asking for a conviction of murder in the first degree, was bound to prove beyond all reasonable doubt not only that he killed her, but also that the homicide was "murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, rape, robbery or burglary."

Under an indictment for arson, evidence of two previous and abortive attempts to set fire to the same premises, though there was no evidence that they were made by the defendant, was

admitted to show that the last fire was not accidental: *Reg. v. Bailey*, 2 Cox C. C., 311. In *Reg. v. Proud*, Leigh and Cave C. C., 97, 101, the charge was embezzlement by the defendant as clerk, who made false entries in his book of the amounts by him received. It was held (by Pollock, Wightman, Williams, Martin and Channell) that the book was evidence generally, that not only the false entries bearing directly upon the three charges in the indictment, but also other similar false entries, were competent evidence. *Reg. v. Richardson*, 2 F. and F., 343, was a charge of embezzlement against a clerk who made out weekly accounts of his payments. On three occasions within six months he entered the payments correctly, but, in adding them up, made the totals £2 greater than they were, and took credit for the larger amounts. These were the cases on which the indictment was founded. Evidence that, on a series of occasions before and afterwards, precisely similar errors had been made and advantage taken of by him, was received to show that the errors in the three instances to which the indictments related were intentional and fraudulent, and not accidental. *Com. v. Tuckerman*, 10 Gray, 173, 200, was a charge of embezzlement. The court say: "Where the intent of the accused party forms any part of the matter in issue, evidence may always be given of other acts not in issue, provided they tend to establish the intent imputed to him in committing the act." *Com. v. Shepherd*, 1 Allen, 575, 581, was another case of embezzlement. It was held that evidence of another act of embezzlement by the defendant, during the same week, was competent on the question of intent. In *Com. v. Eastman*, 1 Cush., 189, 216, the defendants were indicted for obtaining goods of certain persons by false pretenses. Evidence of the purchase of other goods from other persons was held competent on the question of criminal intent. *Reg. v. Roebuck*, Dearsly and Bell C. C., 24, was another case of false pretenses. The false pretense was that a chain, pledged by the defendant to a pawnbroker, was silver. Evidence that the defendant a few days afterwards offered a similar chain to another pawnbroker, was held admissible.

Rex v. Winkworth, 4 C. and P., 444, was a charge of robbery. The prosecutor was induced by the defendant's advice to give money to a mob who came to his house, to get rid of them and prevent mischief. To show that the advice was fraudulent, and a mere mode of robbing the prosecutor, evidence was received to

show that the same mob had demanded money at other houses when some of the defendants were present. *Defrese et al. v. The State*, 3 Heisk., 53, 62, was another indictment for robbery. Verdict, guilty of larceny of the prosecutor's watch, which was obtained by the defendant under the pretense of a bet. Evidence was held competent to show that the defendant had attempted to practice the same artifice on other persons and on other occasions. The court say (p. 63): "As a general proposition of law, it is undoubtedly true that no distinct and substantive crime can be shown upon the trial. But this rule is better understood as it is given in the text-books, that the facts proven should be strictly relevant to the particular charge." Upon the question whether the purchase of property from one person was fraudulent, evidence is admissible to show that the purchaser fraudulently bought other property of other persons: *Bradley v. Obear*, 10 N. H., 477, 480; *Hovey v. Grant*, 52 N. H., 569. And the same rule admits evidence of one fraudulent transaction to show a fraudulent intent in another transaction, in criminal as well as in civil cases: *State v. Johnson*, 33 N. H., 441, 456, 457. *Reg. v. Bleasdale*, 2 C. and K., 765, was a charge of stealing coal. The defendant was lessee of a coal mine, and from the shaft of the leased mine he had wrongfully cut into the adjoining premises, and taken coal during a period of more than four years from the coal fields of thirty or forty different owners. All this was held competent on the question of felonious intent in taking the coal of one person.

In an admirable brief of Attorney-General Train's, of Mass., in *Com. v. McCarthy*, Essex, November, 1875 (to which I am much indebted, and which I send to the chief justice), a few similar authorities are cited on evidence of guilty knowledge in receiving stolen goods, passing counterfeit coin, and uttering forged notes. The application of the rule in such cases is too common and familiar, and the authorities are too numerous, to justify counsel in dwelling at length on this branch of the subject. In *Rev. v. Balls*, 1 Moody C. C., 470 (S. C., 7 C. and P., 429), on a trial for forging and uttering a note of the kingdom of Poland, on September 1, 1835, evidence was received to show that the defendant, on August 24, 1835, agreed to forge a thousand Austrian notes, and that in September, 1834, he had plates for printing Polish notes different from that which was the subject of the indictment, and caused five hundred notes to be printed

from those plates. The case was reserved, and the judges held the evidence was admissible. Such evidence is competent, whether the possession or utterance be prior or subsequent, and whether the false documents, notes, or money, be of the same or a different description: *Reg. v. Foster*, Dearsly C. C., 456; *Reg. v. Nisbitt*, 6 Cox C. C., 320; *Reg. v. Salt*, 3 F. and F., 834; *Com. v. Price*, 10 Gray, 472.

Com. v. Edgerly, 10 Allen, 134, 186, 187, was a charge of having a counterfeit bank bill with intent to pass it. It was held that evidence was admissible to show that the defendant had and passed a different kind of counterfeit money at various times and places; and that he had made to a witness statements which amounted to an admission that he was a dealer in counterfeit money. "It cannot be doubted," say the court, "that a direct statement by the defendant, made previous to the transaction which forms the subject of the indictment, that he was accustomed to buy and sell counterfeit money," would be admissible. The fact of his being a professional counterfeiter, or a common dealer in counterfeit money, was relevant to the particular charge of knowingly having a counterfeit bill with intent to pass it; and being relevant, it could be proved by other evidence as well as by his own statements.

On a trial for burglary, it is no valid objection to evidence, tending to show the burglarious intent of the defendant's act, that it proves another and distinct offense; but the intent with which he entered may be shown by proof of a felony committed in an adjoining store: *Osborne v. People*, 2 Parker C. R., 583; *Phillips v. People*, 57 Barb., 353. In *Mason v. The State*, 42 Ala., 532, 539, evidence was held admissible to show that the prisoners had committed other burglaries than that charged. The court say: "The evidence tended to show that there was a privity and community of design between the prisoners to commit offenses of the character charged against them." "Privity and community of design" is a larger phrase than "intent," but it means the same thing. To show their intent, written articles of agreement, signed by the defendants, setting forth their intent of going into the burglary business, would be competent; and it would not be necessary that their agreement be reduced to writing. Their oral statements would be equally competent, as in the case of the dealer in counterfeit money. And the intent may be proved by other burglaries, as well as by written or oral

statements; by acts, as well as by words written or spoken; by the executed, as well as by the executory agreement. And in the case of a single defendant, his intent may be shown by the same kind of evidence that would be admissible against several joint defendants, as in the case of the dealer in counterfeit money. Evidence that a man has often passed counterfeit money has a legal tendency to show that he intends to pass more of the same kind of money found in his possession. The number of his previous attempts to pass such money affects the weight, not the competency, of this kind of evidence. So, when A has broken and entered B's house, and the question is whether he broke and entered it with a burglarious intent, evidence of his having repeatedly broken and entered other houses for the purpose of stealing tends to show the intent with which he broke and entered B's house.

In *Com. v. Turner & Shearer*, 3 Met., 19, 24, 25, this general rule of evidence was applied to a case of kidnaping. The indictment was for kidnaping a negro boy, Sidney, with intent to send him out of the state. There was evidence tending to prove that the defendants got Sidney into their possession in Worcester, by the false representations of both the defendants to his father that Shearer resided in Palmer and kept a store there, and that Sidney was wanted by Shearer to assist him in that store. Sidney was sent to Virginia. Evidence was received to show that, the day before they got Sidney, Turner endeavored to get another negro boy from the almshouse in Shirley, upon a representation that the boy was wanted by Turner's father to live with him in Palmer. This evidence was held competent. The court say: "Evidence of other facts than those connected immediately with the act are always admissible, when the *intent* of the defendant forms a material part of the issue, and when those facts can be supposed to have any proper tendency to establish that intent. Upon recurring to the indictment and the proceedings had thereon upon the trial, it will be seen that the intent with which the defendant did the act complained of became material, and was, in fact, a question directly submitted to the jury to pass upon. The intent and purpose of the defendant in obtaining the possession and custody of the individual alleged to be unlawfully taken, were to be inferred from a great variety of circumstances, and necessarily opened a wide door for the introduction of evidence of the acts of the party accused,

having any reasonable degree of connection with the particular act complained of. It was with the view of fixing the character of this last act, that evidence was received of the conduct and declarations of the defendant on the day previous and at another place, and in reference to another individual about whom overtures were made with a view of obtaining possession of his person. With reference to such a purpose, and thus limited, it seems to us to have been properly admitted." On a charge of keeping liquor for sale, evidence that the defendant had previously sold other liquor, or kept other liquor for sale, or was a liquor dealer, is admissible on the question of intent: *State v. Plunkett*, 64 Me., 534; *Com. v. Stoehr*, 109 Mass., 365; *Com. v. Dearborn*, 109 Mass., 368.

A person's character for chastity, when it is relevant, is not shielded from inquiry. It is a disagreeable subject of investigation, but the law makes no discrimination between subjects that are agreeable and those that are disagreeable: *Wood v. Gale*, 10 N. H., 247. Sexual crimes are not excepted, as a peculiar class, from the operation of the general rule that admits relevant evidence. On an indictment for adultery, evidence of previous improper familiarities is competent: *State v. Wallace*, 9 N. H., 515; *State v. Marvin*, 35 N. H., 22; *Com. v. Merriam*, 14 Pick., 518; *Com. v. Lahey*, 14 Gray, 91. In *Com. v. Horton*, 2 Gray, 354, and *Com. v. Thrasher*, 11 Gray, 450, it was held that, although improper familiarities were competent, proof of actual adultery (other than that charged) committed by the same parties with each other was incompetent; but in *Thayer v. Thayer*, 101 Mass., 111, 113, 114, the absurdity of that distinction was acknowledged, and the two cases which established it were overruled. The court say: "When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend over a period of time both anterior and subsequent to it. The rules

which govern human conduct, and which are known to common observation and experience, are to be applied in these cases as in all other investigations of fact. * * * By the application of the rule laid down in these cases (*Com. v. Horton* and *Com. v. Thrasher*), evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* cannot be shown by stronger evidence than the criminal act itself."

A "concurrent adulterous disposition" in both parties is not necessary to be proved in a case of rape. *Williams v. The State*, 8 Humph., 585, was an indictment for an assault with intent to commit a rape upon the defendant's daughter. Evidence was received showing his previous attempts to have sexual intercourse with her. And this was held competent to show the intent with which the assault charged in the indictment was committed. The same doctrine prevails in this state. Even Judge Bellows, who is understood to have entertained extreme opinions adverse to collateral issues, was not aware of any reason that would justify the court in departing from the principle of our own decisions: *State v. Knapp*, 45 N. H., 148, 156, 157.

Suppose the defendant were tried for breaking and entering the store at the north end of Elm street in Manchester—the most northern of all the stores on that street—with intent to steal: suppose it were proved that he broke and entered that store; that he was arrested as soon as he entered it, and the only question were whether he intended to steal: suppose there were one hundred other stores on that street, and he had broken and entered every one of them, and stolen something in every one of them, beginning at the south end of the street and taking the stores in succession, on his burglarious march from one end of the street to the other: suppose he did all this in one night, and was completing his night's work when arrested: on the question of his intent in entering the one hundred and first store, would anybody think of objecting to evidence of his one hundred larcenies in the other one hundred stores? His robbing one hundred stores would tend to show that he intended to rob the one

hundred and first, just as his passing counterfeit money in the one hundred would tend to show that he intended to pass counterfeit money found in his possession in the one hundred and first. There would be no difference between his presence in the one hundred and first store, and his having counterfeit money in his pocket in that store, that would, on the question of intent, affect the admissibility of the evidence of what he had done in the other hundred stores. Suppose, instead of robbing stores, he had robbed persons, going from one end of the street to the other, and knocking down and robbing one hundred men, one after the other, and not touching a single woman: suppose, when he had knocked down the one hundred and first man, and before he had had time to rob him, he had been arrested, and the question were whether he intended to rob him—whether his last offense were an attempt to rob, or a mere assault, or an assault with intent to kill—would anybody suppose his robbing the other hundred men, after he knocked them down, was no evidence of the intent with which he knocked down number one hundred and one? Suppose the one hundred and one persons whom he assaulted were women: suppose he touched no man: suppose he had unsuccessfully attempted to ravish one hundred of them, and were arrested at the instant of his knocking down the one hundred and first, and the question were whether his last assault were a mere assault, or an assault with intent to commit a robbery, or an assault with intent to commit a rape: suppose the last woman assaulted should die of her injuries, and the defendant were indicted for her murder: and suppose it were necessary (as some judges in this state, as well as elsewhere, have thought it to be—*State v. Pike*, 49 N. H., 399, 404, 405, 406) to allege in the indictment the offense which the defendant was attempting to commit when he struck the blow that unexpectedly proved to be fatal: would your honors, if it were your duty to draw the indictment, think it necessary to allege any other attempt than an attempt to commit a rape? Would you think it necessary to allege an attempt to commit a robbery? And how would you expect, if you were the prosecuting officers, to find any better evidence of the defendant's intent than his attempts upon the other one hundred women? It was as necessary for the state to prove the defendant's intent to commit a rape in this case as if it had been necessary to allege such intent in the indictment.

If the defendant were indicted for kidnaping, or attempting to kidnap, a negro boy (before the adoption of the thirteenth amendment), would anybody think it doubtful whether, on the question of intent, other attempts of the defendant to get other negro boys into his possession for a slaveholding purpose would be competent evidence? And, when the intent is the thing to be proved, what difference is there that affects the admissibility of evidence of other similar acts, whether the defendant gets a negro boy into his possession, with intent to send him into slavery, or whether he gets a girl into his possession, or makes an assault upon her with intent to commit a rape? The proved intent with which he takes possession of the person of one boy or one girl, tends to show the intent with which he takes possession of the person of another boy or another girl. In *Com. v. Turner*, evidence that the defendant attempted to get possession of a negro boy in Shirley, under false pretenses, tended to show his intent to send that boy into slavery; and evidence of that intent in that case tended so show a similar intent in the other case in which he was indicted. It was precisely as if he had sent one hundred boys from Massachusetts into slavery. The number of instances would affect the weight of the evidence, but not its admissibility. His sending one or more into slavery from Shirley, or getting possession, or attempting to get possession, of one or more in Shirley for that purpose, would be evidence of the purpose for which he got possession of Sidney in Worcester, just as his passing counterfeit money on one occasion would be evidence of his intent to pass other counterfeit money found in his possession on another occasion. What legal distinction is there between proof of the intent with which the boy Sidney was captured in Worcester, and proof of the intent with which Josie Langmaid was captured in Pembroke? Why should sexual crimes, aggravated to the pitch of butchery, be so highly favored by the law as to be licensed and exempted from punishment by a special and peculiar dispensation suspending a general rule of evidence?

The exclusion of evidence on account of its remoteness in point of time or place is the exercise of the discretionary power of the court, passing upon the question as one of fact and not of law: *Palmer v. Concord*, 48 N. H., 211, 219; *Darling v. Westmoreland*, 52 N. H., 401, 408, 410, 411, and authorities there cited; *Haines v. R. T. I. Co.*, 52 N. H., 467; *Hovey v. Grant*, 52 N. H., 569. If too remote in point of time, evidence of

other adulteries will be rejected, in the discretion of the judge who tries the case: *Thayer v. Thayer*, 101 Mass., 111, 114. "The more detached, in point of time, the previous utterings (of forged bank notes) are, the less relation they will bear to that stated in the indictment. * * * It would not make the evidence inadmissible:" *Res v. Wylie*, 1 New Rep., 92, 94; S. C., 2 Leach C. C., 973, 985. "In the trial of that case (*State v. Knapp*) the judge, in the exercise of what is called judicial discretion, allowed the parties to go back fifteen years, and if he had allowed them to go back sixteen years, or only fourteen, no question of law would have arisen as to the proper length of time:" *Darling v. Westmoreland*, 52 N. H., 410.

On page 412 of that case, the court refer to *State v. Wentworth*, 37 N. H., 196, 211, where it is held that the commission by the defendant of other crimes like the one charged, is admissible to show that he had the strength and ability to commit the crime alleged in the indictment, and the whole drift of every page of the opinion in *Darling v. Westmoreland* is distinctly in favor of that principle. But, in the course of a lengthy discussion of the distinction between relevancy as a question of law, and temporal or local remoteness as a question of fact, it is said that in *State v. Knapp*, on the question of the defendant's strength, evidence of his having committed upon various persons the crime of which he was accused would not be offered, because it is understood to be incompetent. This remark, made in connection with a hearty approval of the doctrine of *State v. Knapp* and *State v. Wentworth*, seems either to give the erroneous impression that sexual crimes may not be subject to the general rules of evidence, or to suggest that the court, in its discretion, can exclude evidence of other rapes tending to show strength, on the ground that other evidence of strength must be available, and that proof of other rapes would not ordinarily be offered in good faith on the mere question of strength.

All the evidence objected to in this case, except that of Julianne Rousse, was competent, not only on the question of intent, but also upon the question whether the defendant killed the deceased.

Josie Langmaid was killed October 4, 1875, about nine o'clock in the morning, on the Academy road, on her way to school. On the first day of October, about half-past eight o'clock in the morning, about the time the girls would be on their way to the

academy, the Cochran boy saw a man jump into the bushes, on the side of the Academy road, springing as if in haste, within a short distance of the place of death. On the twenty-fourth of September, at Fowler's house, the defendant, seeing Fowler's sister come home and go into the house, asked Fowler who she was. Fowler told him. The defendant then wanted to know if she had been to Suncook. Fowler told him no; she had been to school. The defendant then wanted to know which way she went to get there. Fowler told him, and pointed out toward the academy to show the direction, and the defendant said that that must be the way he came when he came out to Kimball's. On September twenty-fifth, Fowler carried the defendant home, down Buck street, as far as Locke's, and at Russ's corner the defendant wanted to know if there was where his (Fowler's) sister went to school. Fowler told him no, and pointed out toward the academy again, and told him two miles, or a mile and a half, or a mile, "and then turn to your right and go up." Sunday, September twenty-sixth, Fowler carried his sister back, went to Suncook, and brought the defendant out. As they went past the Academy road, Fowler told the defendant that that was the road on which his sister went to school. About a week before the fourth of October, when the defendant was threshing grain in Fowler's barn, a young lady passed by. The defendant asked Mahair where that gal was going. Mahair said he didn't know. The defendant asked what her name was. Mahair told him her name was Sarah Prentice. The defendant wanted to know where she lived. Mahair told him, going to the door and showing him as near as he could. The defendant wanted to know who was going with her. Mahair said he didn't know. The next day, as Mahair was going through the barn, the defendant stopped him, and asked where that gal went that went down by. Mahair said he didn't know. The defendant wanted to know who went with her. Mahair said he didn't know. The defendant again asked who she was, and where she lived, and Mahair showed him where she lived. Again the defendant asked who went with her, and said he wondered which road she went on the most, and made an obscene and vulgar remark and inquiry concerning her. On the second of October, about nine o'clock in the morning, about the time the girls would be on their way to the academy, Towle and his wife met the defendant on the Academy road, about fifty or sixty rods from the place of death.

the bushes, on
haste, within a
enty-fourth of
eing Fowler's
owler who she
ted to know if
he had been to
which way she
out toward the
said that that
Kimball's. On
endant home,
ss's corner the
(Fowler's) sis-
ted out toward
ile and a half,
up." Sunday,
back, went to
y went past the
t was the road
ek before the
shing grain in
fendant asked
e didn't know.
r told him her
nted to know
oor and show-
nted to know
t know. The
the defendant
went down by.
nted to know

The defend-
d, and Mahair
ant asked who
l she went on
k and inquiry
t nine o'clock
on their way
endant on the
place of death.

The defendant was carrying a stick behind him, similar in all respects to a stick afterwards found, broken and stained with blood, near the place of death. On the last Sunday of September, Anna Watson, on her weekly return from her home in Allenstown to her school in Hooksett, was pursued by the defendant a considerable distance, and until he came in sight of Mack or Mersey, when he suddenly disappeared in the woods. He carried a club, and his face was red and excited. He ran after her more than half a mile.

All this evidence tends to show that the defendant killed Josie Langmaid. It shows that the neighborhood of the place of death was his hunting-ground, and it shows the object and intent of his habitual hunt. Change all this evidence only so far as to substitute partridges for women—and suppose the question were, whether this defendant killed a partridge, found cut in pieces where the remains of Josie Langmaid were scattered; if his talk with Fowler, relating to Fowler's sister, had related to partridges; if he had inquired, not which way she was accustomed to go to school, but where partridges were plenty; if Fowler had twice told him they abounded on the academy road, and pointed out the place; if his remarks and inquiries addressed to Mahair had not related to Sarah Prentice and the road she went on the most, and had not been obscene and vulgar, but had been such as to show he was meditating a partridge hunt; if his interrupted chase of Anna Watson had been an interrupted attempt to kill partridges—would any one object to all this evidence on the ground that it did not show a special intent to kill the particular partridge that was found dead? If a man had been robbed at the place of death, would all this evidence, so far altered as to relate to men accustomed to carry large amounts of money, be excluded because the man who was robbed was not one of those concerning whose route the defendant had previously inquired, or whom he had previously pursued? How would the competency of such evidence be affected by the circumstance that, by some accident, the travelers concerning whom the defendant inquired happened to escape, and that another happened to be the victim?—or by the circumstance that in one instance the robbing intent was exhibited by a pursuit more significant than such an inquiry about a person's route as tends to show a design to waylay or pursue him? The gist of such evidence is not merely in showing an intent to rob the particular travelers, who providentially

escaped, but in showing an intent to rob any one who would be likely to have what the defendant wanted. Are professional highwaymen to be acquitted by the exclusion of previous intentions, preparations, and attempts, because such evidence relates to anybody they may meet, and not to the particular victim named in the indictment? Is the region round about every girls' school in the land to be infested, as the neighborhood of this academy was, by a professional hunter of women, a fugitive from justice, flying from a foreign country to this for the safe continuance of his business? And are such men to be encouraged by being excepted from the rules of evidence that apply to forgers and counterfeiters? Are our daughters to be exposed to human beasts of prey, incited to their diabolical work by an exemption from the operation of those general principles by which even our miserable currency is protected?

The testimony of the Cochran boy tends to show that about school time some man was prowling about the academy road, who was unwilling to be seen and recognized by that boy. It tends to show that Josie Langmaid's death was not accidental. Why was that boy allowed to pass unharmed? His sex saved him. Is not that fair matter of inference and argument? The defendant hunted neither men nor boys, nor old women. The fact that Fowler's sister was accustomed to go to the academy, over the academy road, was a subject that interested him on September 24, 25 and 26. On October 2, about the time the girls would be going to school, he walked on that road carrying a stick, similar in all respects to the one found two days afterwards, broken and stained with blood, near the place of death. His talk with Fowler about Fowler's sister, his talk with Mahair about Sarah Prentice, and his pursuit of Anna Watson, tend to show that Josie Langmaid's death was not accidental; that she fell a victim to the purpose for which the defendant hunted in that region—the purpose for which he so eagerly and repeatedly inquired about the usual routes of Fowler's sister and Sarah Prentice—the purpose for which he so hotly pursued Anna Watson. If he hunted beasts of the field or fowls of the air in that neighborhood, that fact would be evidence on the question whether a beast or bird (of the class which he hunted), found killed in that neighborhood, was killed by him. If he went forth to rob any one he might meet, that fact would be evidence on a question of robbery.

The testimony of Cochran, Fowler, Mahair, Towle and wife, Mrs. Watson and daughter, and Merey, tends to show that the defendant roamed about that district for some purpose; that his purpose was not to pick berries, as Mack did, not to rob any one of money, not to escort the feebler sex through woods and bushes, and protect them against the peculiar insults and outrages to which that sex is exposed in solitary places, not to revive the spirit and practice of chivalry for the defense of women, but to practice upon them the reviving ferocity of a barbaric age. And Josie Langmaid was found killed and mutilated in a manner corresponding to the purpose for which he ranged that part of the country.

All the evidence which I have thus far considered tends to show that the defendant killed the deceased, and also the intent with which he killed her.

II. The jury having found, on other evidence than that of Julianne Rousse that the defendant committed the homicide, her testimony was competent to show the intent with which he committed it. Her testimony was, that he committed a rape upon her, at St. Beatrice, in Canada, four years and four months before the homicide. It was necessary for the state to prove the defendant's intent to commit a rape upon the deceased. If he killed her without premeditation, in a struggle consequent upon his insulting her, or committing an indecent assault upon her, without any raping intent, there was no ground on which he could be found guilty of the first degree of murder. And all the other evidence might be explained on a hypothesis of that kind, consistent with his innocence of that degree of murder. Whether such an explanation would raise a reasonable doubt in the mind of any juror, who can tell? It was the duty of the state to leave no room for doubt. And on the question whether his intent was to commit an indecent assault, or to commit a rape, what better evidence could be had than his intent on other similar occasions when he was not interrupted and defeated, as he was in his pursuit of Anna Watson? If a man's intent to pass counterfeit money at one time is evidence of his intent to pass other counterfeit money found in his possession at another time; if his intent to sell liquor at one time is evidence of his intent to sell other liquor at another time; if his intent to send one negro boy into slavery is evidence of his intent to make the same disposition of another found in his possession—why is not his intent to

commit a rape upon Julianne Rouse, when he took possession of her, evidence of his intent to make the same disposition of Josie Langmaid, when he took possession of her? Manifestly the only objection to this evidence is the remoteness of the rape in point of time and place. It is settled by the authorities which I have cited, that that objection raises a question of fact within the discretion of the court, and not a question of law. The question of discretion is reserved. Should the judgment be reversed, and a new trial granted, on the ground that, as a matter of fact, the rape to which Julianne Rouse testified was temporally or locally too remote to be entitled to any weight on the question whether the intent with which the defendant assaulted the deceased was the same as that with which he assaulted Julianne Rouse?

If he had passed counterfeit money at the time and place when and where he raped Julianne Rouse, and other counterfeit money had been found in his possession at the time and place when and where he killed Josie Langmaid; if he had sold liquor at the former time and place, and other liquor had been found in his possession at the latter time and place; if he had got a negro boy into his possession at the former time and place with intent to send him into slavery, and had got another negro boy into his possession at the latter time and place—would there be any doubt that his intent on the former occasion would in fact be considered, by every intelligent member of the human family, as entitled to some weight on the question of his intent on the latter occasion? If a shipmaster lands in Congo, obtains a cargo of blacks and carries them to Cuba, and four years and four months afterwards he is found at another place on the African coast, as far from Congo as Pembroke academy is from St. Beatrice, with a hundred blacks in his possession, would anybody think that his proved intent on the former occasion had, as a matter of fact, no tendency to show what he intended to do on the latter occasion? What want of analogy is there between making prisoners of blacks at such different times and places, and making prisoners of these two young women? What is there in the color of the captives in the former case that can carry more significance, from the proved intent of their captor in one abduction to the question of his intent in another, than is carried in this case by their age and sex. Or carry the significance across a greater interval of time or place, what is there in the act, the circumstances or the intent of kidnaping, or passing

counterfeit money, or selling liquor, that makes us feel the probative force of the proved intent of one occasion upon the question of intent four years and four months afterwards, and prevents our feeling any probative force of such evidence in the present case? There is no distinction that can exempt sexual cases from the effect of the operation of such evidence upon the human mind, or shorten in those cases the temporal or local distance reached by such evidence, in other cases. That is plainly true, as a matter of fact; and it is a mere matter of fact that we are considering.

The distance of place is immaterial. The defendant could have gone in a few hours from the place where he clutched Julianne Rousse, to the place where he pounced upon Josie Langmaid. There was nothing in either of the places peculiarly calculated to create or destroy an intent to pass counterfeit money or to commit a sexual crime. The distance of time is the only possible ground of objection.

On this point I must appeal to the court as I would appeal to a jury, because the question is one not of law, but of fact. If your honors were the sole tribunal, trying the defendant upon this indictment, and sworn to decide upon grounds of natural law, natural reason, and human experience, upon such evidence as on those grounds seemed capable of affording any light, would you receive the testimony of Julianne Rousse? I do not hesitate to assert that you would receive it, and weigh it. No man on earth would refuse to hear it, or to consider it, unless he were bound by some arbitrary and irrational rule overriding his understanding, and dictating a course at war with his common sense. Your honors would give it some weight, because you would infallibly know, from the teaching of history and universal experience, your knowledge of human nature, and the authority of an intuition superior to all artificial reasoning, that the evidence of the intent with which the defendant seized Julianne Rousse has some tendency to show the intent with which he seized Josie Langmaid, notwithstanding the two seizures were separated by the distance of four years and four months. Whether the weight of the evidence is diminished by that lapse of time, and if so how much, are questions that do not arise here. But the question whether your honors, in the supposed trial, would receive the evidence and give it some weight, is the very question to be decided in this case; for it is settled that whether evidence

should be excluded for temporal or local remoteness is a question of fact, and not a question of law; and the question of fact here is, whether, on those grounds of natural law, natural reason, and human experience, upon which such a question of fact must be decided, the intent with which the defendant assaulted Julienne Rousse is capable of affording any light on the intent with which he assaulted the deceased.

For error in ruling on a question of law, the court might feel bound by precedent to grant a new trial, although satisfied that no injustice had been done. But on this question of discretion, in which not law, but justice alone is concerned, will the court reverse the judgment of the circuit court, without any cause to believe that the defendant has suffered actual wrong?

It will be admitted, I suppose, that every intelligent person, untrammelled by technical rules, will concur in the opinion of the circuit court. And the question being one of pure fact unmingled with law, and, therefore, not subject to technical rules, on what ground will any one dissent from the unanimous judgment of the rest of mankind? If that unanimous judgment were a conclusion of metaphysical subtlety, or scholastic sophistry, or a blind faith, based on an evident obliquity of mental or moral vision, a misunderstanding of natural phenomena, ignorance of the laws of the material or spiritual universe, or a tradition or superstition that had survived the low civilization of its origin, it might be a feeble authority. But it is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention; a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness. Why should any one be particularly anxious, in this case, to introduce not a legal principle, but a dogma of fact, refuted by the instinctive knowledge of the whole human race? If, in the administration of justice, the experiment is to be tried of deciding such questions of fact as this in defiance of the innate and universal logic of rational creatures, it certainly is not necessary that this class of cases should be selected for the attempt. In asking that the experiment may not be first tried in a case of this kind, I utter the fervent remonstrance and prayer of every father and mother who has a daughter, at school

or at home, exposed to the fate of Georgie Lovering and Josie Langmaid.*

W. T. Norris (with whom were *S. B. Page* and *H. W. Greene*), for the respondent.

In urging our bill of exceptions, what of it relates to the testimony of *Julienne Rousse* will first be considered.

Commenting on the use the jury might make of it, the court gave them this instruction: "It is a fundamental principle of law, that evidence that the defendant committed one offense cannot be received to prove that he committed another and distinct offense." Here is a familiar principle well enough stated. It is indeed fundamental—old as the common law, and wise as common sense.

No claim is made by us to exclude her testimony from use, under the direction of the court, because it proves another offense, but because it proves a distinct offense. Put the word transaction in the place of the word offense, and we encounter the same objection. It all rests on the ground of distinction. Want of connection—the crime disclosed with the crime charged—is the reason of the exclusion. It has no other foundation.

Crime is made up of act and intent combined. Without the evil intent, or what amounts to it in law, there is no guilt. Without the overt act there is no sin, in the eye of human tribunals. And it seems to be agreed on all hands that such evidence as hers is not competent in proof of the act of murder. Up to this point there is no controversy. "Only upon the question of intention, and thus upon the degree of guilt," does the court below attempt to make it competent.

No exception was taken to the charge, because the use the jury was instructed to put the evidence to, after it was in, was perhaps as well for our client as any charge could have directed. Our objection went to its admission. It went in subject to our objection. As it went in, the jury were free to use it on any question before them. If only two questions were in issue, they could

*In the trial of *Mr. Hawkins*, a clergyman, for stealing money and a ring from *Henry Larimore* in September, 1668, Lord Hale admitted evidence to show he had once stolen a pair of boots from a man called *Chilton*, and that, more than a year before, he had picked the pockets of one *Noble*. In summing up, Lord Hale said, after referring to the case of *Chilton* and *Noble*, "This, if true, would render the prisoner now at the bar obnoxious to any jury:" 6 *Howell's State Trials*, 935. (This was 208 years ago.)

use it on either. But the court tells them they must use it on but one of the two. How could we object to that? What is the exception to that charge? After deferring unduly, as we believe the court did, and against our exception, to what the external exigencies of the cause were clamorously demanding, what right had we then to object to a partial correction of the error and prevention of the injury? Why talk about "an unexceptionable charge?" We could not object to what was charged in our favor. Our wish was, that nothing be charged as to how this evidence might be used. Our objection to its admission would then have its full force. If the charge had been that it be not used at all, we had to that charge no valid objection. But the jury would have had the evidence, and we might have lost our objection to its admission. What the court did say in the charge we could not object to, and still, the more it did not say, the better for the objection already taken. We were in a strait, with the less said the better. But do not call it "unexceptionable." "Take any shape but that," my adroit friend. Our firm nerves tremble, and our cheeks blanch, before even a shade of a ghost of a right slaughtered or lost by our negligence. Do not try to save your verdict by making a "corner" on us for not excepting to the charge. What then is "the only question of law raised by the bill of exceptions?" Not, we submit, "whether the evidence objected to is admissible for any purpose. No claim is made that the evidence we are now considering has any legal tendency to show that the defendant killed the deceased." Has it any legal tendency to show "that he intended to commit a rape upon her?" Is the intent to commit a rape upon her in question? It is the act, either of attempt or perpetration of that crime, resulting in murder, that must be shown. No matter about any express intention. One may be implied if the act be proved. Our objection to the evidence raised the question whether it was inadmissible for any reason. It may be competent on one ground, but incompetent on another ground. Under our general exception, we take it we have the benefit of this distinction. How much of it is taken away from us by the special charging of the court? Pray, give us all there is left. And, even then, do not hang our client because the court below erred in not assigning him counsel a match for all the regular and special counsel for the state, aided by a whole train of them from over the border.

Actual proof of intention is not always needed. Malice, the essence of all crime, may be express or implied: *Brown v. Commonwealth*, 76 Penn., 319.

It is not indispensable to a conviction that a motive be proved: *People v. Robinson*, 1 Parker C. R., 644.

Murder by a free moral agent, when no motive or provocation is shown, we take it, must be of the first degree. Under the laws of causation, claimed to be universal, sane men act from motives. Madness may have method in it; but with a sound mind and well proved act as given data, all needed motive is presumed. And, in the case at bar, no real intention to murder need be either proved or implied. It is enough if a rape was attempted or perpetrated, and the murder followed. Take away the rape and the attempt of it, and fix the act of killing upon the respondent, and then his crime, without other proof of intent, takes the utmost degree of enormity. "Sex, age and mutilation" may not alone bridge over "the wide gulf between" murder and death from accident, disease or suicide, or the thousand and one mere figments of the brain that may be conjured up to hold open the door the circuit court ought to have kept shut and securely barred. But the point we make here is, that no actual proof of express malice of any kind was made essential, by any phase of allegation or answer, either in pleadings or proofs the case presented.

Under our statute defining the degrees of murder, arson, rape, robbery and burglary, in conditions there given, are merged in the greater crime, as much as poisoning, starving or torturing. Hence, none of these acts thus ending in murder can be the motive of the murder. No act or thing, nor any part of it, can be the cause of its own being. Instead of motives, then, these acts or attempts are mere methods or occasions of the murder. Hence, evidence tending to prove the act of rape, tends, by the same token, to prove the act of murder; and if it is to be excluded because it tends to prove the act of murder, by the same rule it must be excluded from proving the act of rape.

Premeditation of crime, or the means to do it with, may precede the bare act of it a long time. Hence, evidence of them may seem to take a wide range in both time and space. Buying poison may be shown, or stealing it, no doubt, with burglary and arson, perhaps; it may be a witness of a former crime, or a *particeps criminis* liable to turn state's evidence, who is put out of

the way; prior like attempts on the same person or thing, or like crimes on other persons, but standing in similar relations and giving rise to the same motives; sexual crimes or acts indicating a desire of change in marriage relations—in all these cases, and many more found in the books, a prior crime may be disclosed; but in all of them this disclosure is a mere incident, not, as in the case at bar, an element, or the burden of the evidence. And this we understand to be the true rule and spirit of all the authorities. It completely covers and disposes of all the murder cases cited on the other side: on a charge of shooting with intent to kill—proof, shooting at the same person at another time; charge, murder of her husband by poison—proof, three of her sons being subsequently poisoned; charge, murdering her children by poison—proof, two other children of hers, and a lodger in the house, had died of poison; charge, murder of Garner's mother by poison—proof, the wife, also charged, had lived in his family as a servant when his first wife died, and that she died of poison; charge, murdering her infant by suffocation in bed—proof, deaths of her other children at early ages; charge, murdering H.—proof, H. had been employed by the defendant to murder P.; charge, murdering the defendant's wife—proof, his adulterous intercourse with another woman; charge, murder—proof, adulterous intercourse between the defendant and the wife of the deceased; not a single one of them in violation of the rule laid down in *Shaffner v. Commonwealth*, 72 Penn., 60. "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish."

Take the authority quoted in the charge: "Whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time he did the act complained of, it is admissible"—not merely by showing, as in this case, that the prisoner had a native propensity, by him held in common in kind with all other men, liable, in him and them, to be inordinately inflamed; nor by merely showing him to be a bad man, because in him it had been so inflamed in a single instance by a single person, a member of his family, after years of familiarity and, perhaps, fascination, but by showing this particular bad intent or inflam-

mation of passion to have actuated him at this time, and on this occasion.

Take our own case (*State v. Knapp*) cited on the other side. On one point we do not believe in its doctrine. It is not well considered. It has some aid from other cases, but it is not sound logic, it is not good law, it is not common sense, to infer, as it does, an act of such extreme criminality from incipient acts ordinarily having a much less criminal but more natural ending; but on proving strength to commit the crime alleged, it is sound as a rock. Physical strength is a physical fact, to be proved like any other physical fact, when courts and juries are expected to use their own experience and observation of the natural course of things. Suppose, in the case, the ability of the defendant in another direction to commit the rape had been in issue—that he was a man or his victim a woman; evidence then, if needed, might have gone back to the time of their births without touching any question of discretion. My brother does not venture this case out on the first point, and on the last he entirely mistakes its meaning. Courts have no discretion in admitting or rejecting legal testimony. In middle life a man's strength may be well shown from exertions of it fifteen or twenty years back. It would not do to go so far back on those made by a boy of twenty, or an old man of seventy-five. In either case they would not be evidence. And this is about all there is of discretion on questions of evidence.

When the *scienter* or *quo animo* becomes an essential factor in the problem of guilt or innocence to be solved, when proof of malice becomes indispensable to a conviction, such evidence of other like acts may then be competent: Wharton's Crim. Laws, 649. It is so when proof of the motive becomes peculiarly material on account of some peculiarity of the crime, or its dependence on some peculiar motive, when the act is innocent as a rule, and its criminality the exception. Under this head we can dispose of all the cases cited on the other side, or found in the books, of forgery, counterfeiting, uttering base paper or coin, embezzling, obtaining money and goods under false pretences, fraudulently conveying or pledging property, kidnaping boys, and other fraudulent transactions. In such cases the intent is always material to be proven. It can rarely, if ever, be inferred, because the act, or what constitutes that part of the crime, is just like what is innocently done by everybody in the every-day

business of life. Notes and obligations are signed and negotiated, clerks and agents are trusted and entrusted, boys hired, with traffic in all its endless ramifications, running in debt, failing and running away, tight places, temptations, pride, pinching poverty, with money in all hands, hard and soft, going the rounds of circulation, begetting a love of it, the root of all evil, and giving occasion or motive for a great number of offenses, both *malum in se et malum prohibitum*, known to modern civilization and law, where intention of wrong-doing is often almost the only index and exponent of the criminality. In these cases the mind the thing is done with is the question of questions; and, mind you, the act is proved, or not questioned. Hence, it stands to reason that the intent or knowledge this act—innocent or indifferent in itself, it may be—is done with may well be learned from other acts of the same kind, done under the direction of the same mind. Perhaps the rule is best put in the words of Lord Mansfield: "When an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in case of failure thereof the law implies a criminal intent."

In a murder case, cited in a note in Roscoe's *Crim. Ev.*, page 92, as *Heath's Case*, 1 Harnson, 507, evidence was held competent to prove that the accused, on the same day the deceased was killed, and shortly before the killing, shot a third person, though it proved a distinct felony, as it appeared to be connected with the crime charged as a part of the same transaction. Not being able to see the full reported case, its doctrine as digested is not verified. Obviously the term "distinct" is not used in the sense of disconnected, any further than to mark two distinct felonies. It has no reference to a separation of the acts constituting the crimes; they were connected as parts of one transaction. Hence the case comes within the rule, that to be competent, one crime to prove the other, they must be connected. With a slight expansion, and perhaps without, this case seems well enough to cover the chain of facts so closely connected together in Elm street and in my brother's fertile brain, extending from one end of it to the other—meaning the street, of course—taken in "succession," and "all in one night." *Regina v. Cobben*, 3 F. and F., 833, is exactly in point, where, on a trial for breaking into a booking office of a railway station, evidence was admitted that

the prisoner had, on the same night, broken into three other booking offices of other stations, "on the ground of the four cases being all mixed up together."

It is hardly worth while for me to review any more cases cited by counsel for prosecution. Our case is murder. On trial it is proposed to show a murder committed in perpetrating or attempting to perpetrate rape. Evidence in proof of that charge was offered, tending to show that, four years and more before, the defendant committed rape without murder on another person in a distant country. We objected. Objection overruled. Evidence admitted. Jury instructed to use it in finding intention only, and thus finding degree of crime. No claim is made that the evidence helps to find intent, only in so far forth as it helps to find a bent of mind or inclination to commit that kind of crimes. We say no such help is legal, whether claimed as a question of logic, law or discretion. No case has been cited looking our objections squarely in the face. And if the rule of evidence, sought for by the prosecution, cannot be found in capital cases, this court will not seek far for guides in this case in paths taken in tracing out men's ways that are dark, in killing horses, hunting partridges, or putting money in the purse.

It is not competent to show that one has a tendency to commit crimes like the one he is charged with: *State v. Renton*, 15 N. H., 169. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another.

Shaffner v. Commonwealth, 72 Penn., 60, is a modern case, in a strong court, well considered, and almost exactly in point. Case: Shaffner indicted for murder of wife by poison; wife died June, 1871; evidence to show death from poison; main question, was it administered by husband; evidence of improper intimacy with one Susan Sharlock; evidence of symptoms of wife's death; evidence offered that a first wife, who died in September, 1869, and John Sharlock, Susan's husband, who died in February, 1871, both died at the defendant's house, with similar symptoms as last wife, and that all of them were under his care at the time they died. Evidence as to first wife rejected; as to John Sharlock admitted; verdict, guilty; motion for new trial overruled; sentenced to be hanged; writ of error to Supreme Court; new trial ordered, because of admission of this evidence. Here we have two cases, and others might be cited—one our own

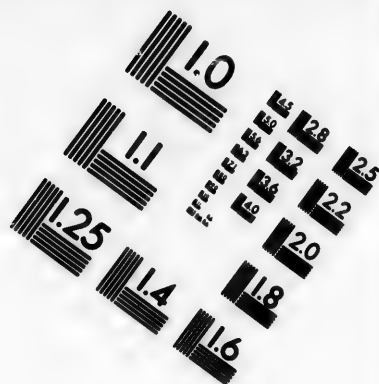
and some time back, by as able a court as we ever had; the other of very recent date, by an able court—fully sustaining the whole ground of our exceptions now under consideration.

No well read lawyer need be told that the doctrine of these cases is the doctrine of all the best earlier authorities. Indeed, until quite recent times, it was so far removed from debatable ground as not to be questioned. We may differ about the reason of its existence. It may have owed its birth to a sacred care for human life, to a judicial protest against sanguinary legislation, or to a conviction that disposition of mind, even when use has bred a habit, is too frail a premise to draw inferences from, bearing on issues of life or death. Whatever its reason, nobody doubts it existed. And we ask the court to consider whether or not it may come under the provision of the constitution, that "all the laws which have usually been practiced on in the courts of laws, shall remain and be in full force until altered and repealed by the legislature." How much rules of evidence may come within the scope of this provision, perhaps, has never been determined. We are not sure, but think the point worth considering. Interest in the result of a cause, as a bar to the person testifying, had to be or was let down by act of legislation.

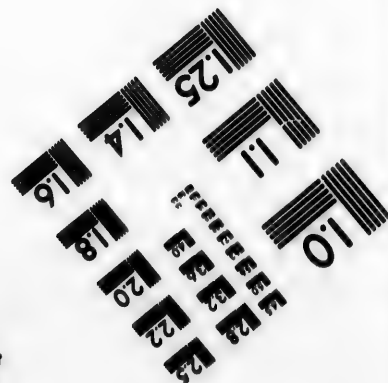
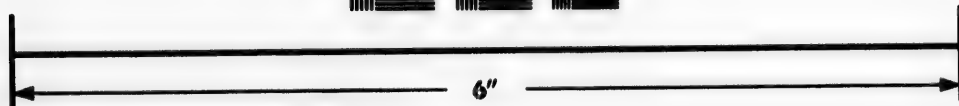
No rule of law is better settled than that the "evidence shall be confined to the point in issue." My brother insists on it, but likes the terms "pertinent" and "relevant" better. We insist on it, and do not care about the terms. It makes no odds that we know of how many circumstantial facts are put in evidence. What the rule demands is, that they be each one circumstantial—*circum stans*—standing around, each one to be proved as a primary premise, not as an inference from which the conclusion or verdict is to be drawn. "Plucking the grass to know where sits the wind" may be sensible enough, but throwing up straws to tell which way it will blow four years hence, lacks wit as well as poetry. It is of the nature of water to run down hill—it has a strong tendency that way; but who would think of inferring hence alone that a given water had run down a given hill? Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offense. Next premise: this general disposition in him. Inference: he committed this particular offense. "Presumptions

of fact are in truth but mere arguments." Hence, as all the evidentiary aid one of these acts gets from the other is through this presumption of general disposition, it is but mere argument. No mark, except the class mark of kind, have they in common. And why such proof has not been used is because the argument is too far-fetched—"too thin"—an inference from a presumption; a chain of reasoning of two or three links, with ample hiding-places for abundant fallacies. It may be tried "by the common test of the validity of arguments." Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if so more likely to be guilty of rape, and if there was a murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an *ex parte* conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a motive or occasion of the murder. We can find nothing like it in the books, and much of the best ability in the profession is all up in arms against this innovation.

As a question of logic, then, there is no evidentiary power in this testimony, entitling it to use in a trial of this kind. As a question of law, we have already attempted to show that, if it has any such power, it cannot be used here. And now we say, if there be any question of discretion about it, it ought not to be used. On this point, the reasoning of the court in *Shaffner v. Commonwealth*, already cited, suggests all that need be said. But we take no time on this point. If the point of law does not save us, we cannot, in the nature of the case, hope much from that of discretion. In fact we do not believe much in questions of discretion when a man's life is at stake. Hanging ought not to go by discretion. It is our client's last chance for his life. He is entitled to a fair trial by "due process of law," even if "his complexion be perfect gallows." And due process of law does not go much on discretion. All the light the jury sees his case in ought to be pure legal testimony. It should all emanate from the elements and incidents of the tragedy. It may get



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

toned or shaded in transmission, not unlike the rays of sunlight by refraction, but when it passes the bench to the panel it must be free from court coloring or discretion.

Murder will out. Its witnesses, though dumb, will speak. If need be, the voice of murdered blood will cry out from the ground. Each new case has its peculiar horror. Now and then "a devil, a born devil," who, "like the shark and tiger, must have prey," will run a terrible race in crime before detection. But, be sure, his crimes will find him out. Innocent men will sometimes be accused. Even "the most guilty criminal may be innocent of other offenses charged against him, of which he might acquit himself if fairly tried." "He may be guilty of them, and still innocent of the one with which he stands charged." No one can tell how soon he may be the victim of seeming adverse circumstances. Such things have been, and may be again. And when they do come, a wise and firm administration of the law, in the face and eyes of popular indignation, is our only city of refuge.

Who knows the jury "found the homicide committed by the defendant, on other evidence than that" we have been considering? Is it so said by a general verdict of guilty? It is not so said by the case made by the court allowing the exceptions. My brother says it in his argument. And it is just here that our exceptions, as it seems to me, take on their most formidable proportions. Even my learned brother, after years of experience in the trial of criminal cases, gets confused and misled, or means to mislead, as to the use made of this testimony. It is said by the court, in *Shaffner v. Commonwealth*: "Logically, the commission of an independent offense is not proof of itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for, certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged; it, therefore, predisposes the mind of the juror to believe the prisoner guilty." It tends to give undue prominence and force and weight to all the other evidence in the case for the prosecution. It detracts, in like manner, but in double portion, from all the evidence in his defense. It prejudices the jury against him, and inclines them to look with suspicion on all who come forward to testify in his favor. Hence, it is "not only unjust to the prisoner to compel him to acquit himself of

two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues, that tend to confuse and mislead the jury." And the problem for "human reason and human experience" to solve, in view of this "natural law," is, not what rule is desirable to be applied in a given case, but what one, on the whole, is wisest and best to be applied in all cases.

Who can say that "no injustice has been done?" We have found that neither tendency to crime, evil disposition, nor bad character can enter the lists as circumstantial evidence: 1 Phillips' Ev. (7th ed.), 181. Even admissions made of a similar crime, and of a tendency of mind that way, cannot be competent: 1 Chitty Crim. Law, 504. Proof that the accused was influenced by a strong motive of interest to commit the offense charged, ought never to operate in proof of the *corpus delicti*: 1 Starkie Ev., 490. When tendency of mind is excluded, what vestige of the first crime is left, by which the defendant is to be traced to the last one? Neither mental nor moral science has as yet been able to mark out a path by metes and bounds, nor even to blaze a trail, by which this border land of probabilities may safely be entered in legal criminal investigations.

In questions of character, it is held that mere proof of isolated facts can afford no presumption: 1 Taylor's Ev., sec. 326, and if not of character, how of tendency of mind or disposition—a mere element of character? Crime is possible of everybody; it is probable of nobody. We might cite any amount of authority against inviting juries, much more sending them, out on voyages of conjecture and speculation. Investigating possibilities of crime is not their province, and this testimony touches on possibilities. "Seven hundred pounds, with possibilities, is good gifts." But proof of a single crime, years ago, with possibilities after, is bad evidence.

My brother says "this evidence was cumulative." What evidence he means we are not quite certain. If he means what we have been talking about as no evidence, then his notion of cumulating with it, or on it, is, in our estimation, like what somebody—Tom Hood, is it?—says about increasing, cumulating, a wife's salary; it was nothing before, and so it was doubled. If it has no legal status in court, it can neither cumulate nor be cumulated. Here there can be no distinction between its relevancy as a question of law, and its temporal or local connection as a question of discretion.

Nor is the question of good faith in putting it in in question. We say it was put in by the counsel for the prosecution without any indication to the court; the jury, the respondent, or his counsel, as to how it might be used. No such indication came from the court till all the evidence in the case was closed, and this evidence had done its work. We make no point of good or bad faith; we merely state a fact. If the jury found the defendant on other evidence guilty of this homicide, then there was no need of any more evidence: *Commonwealth v. Webster*, 5 Cush., 305; *Commonwealth v. York*, 9 Met., 93, and cases there cited from other state and foreign courts.

We are not driven to charge bad faith, or even that injustice was done. It is enough that it may have been done.

In *Regina v. Odly*, 4 Cox C. C., Lord Campbell, after saying "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first," adds this logical and common sense caution: "Allowing evidence to be given of the uttering of other forged notes to other persons has gone to great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal laws." Prejudice is a wily fellow in a jury-box. He had full license—*carte blanche*—with this testimony for a long time, before the court called him to any account. Hence the burden is on the other side. Not one of the jurors can tell how much his mind was confused or misled. Law is exceedingly jealous of both these clouds on reason and judgment; but the testimony was in there, liable to do mischief, and that is enough for our purpose.

In *Coleman v. People*, 55 N. Y., 90, a late case, it is said by the court, all the judges concurring on this point, "The general rule is against receiving evidence of another offense," "however persuasive the evidence may be in a moral point of view." Same case before the same court in 56 N. Y., 591, and affirmed. Up again in 58 N. Y., 555; general doctrine reaffirmed, where the court said, "The true rule, and the only rule that can be sustained on principle is, that the intendment of law is that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for reversal of the judgment, unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious."

It is not this defendant alone who is on trial in this court. If

he "has received no actual wrong," as we contend he has, and as there is, to say the least, a chance for, in piecing up the detached fragments of evidence in his case, law and the course of justice have a right to complain. We speak now for the integrity of the rules of evidence. We may have monsters of crime in our day. Old-fashioned notions may not be quite up to my brother's anxiety in dealing with cases of modern depravity. He seems still haunted by the ghost of one subject for a mad-house, sent to the halter on his own confession. And has he himself partaken of the insane root, that he would obliterate the line between judges and juries, and let men be tried for their lives on such "grounds of natural law, natural reason and human experience," as any twelve men, picked by chance from like chance pickings from men selected without reference to special aptness or training, may chance to adopt in a jury-room? Is he prepared to denounce any rule of evidence, deemed wise and salutary hitherto, as arbitrary and irrational, because it happens to stand in the way of a conviction of a man whom, in his zeal, he has come to regard as surely guilty? Your honors might give some weight to the evidence on the question of interest, if certain both crimes were committed, and committed by the same person.

But just here, the "teaching of history and universal experience, your own knowledge of human nature, and the authority of an intuition superior to all artificial reasoning," all admonish you not to trust to a jury evidence of a fact entirely disconnected from the main fact and not made certain, from which to draw such inferences as their whim or caprice may dictate of a man who has been followed by a hue and cry of the whole community ever since the detectives first thought they scented his track, crossing the trail they were following of the first man by them beat out of cover in hunting for the author of this terrible tragedy. No man on earth would be willing to trust his life to such an ordeal.

In the next place, we will make short work of the rest of our bill of exceptions.

It need hardly be said that what has been considered we regard as its head and front. In justice to myself, perhaps, I ought to say that I rely but little on any of the rest.

All the testimony tending to prove his chasing the Watson girl we regard as clearly irrelevant, on the ground that it comes

to nothing, and, therefore, is mischievous. It was two weeks before the murder; it was three or four miles away from the scene of it, and not in the same direction from his residence; it was a day, and the same time of day, when other people were out in the same locality, on what they, no doubt, deemed innocent pastimes. At least two other men are shown to be on or near the same road at the same times and places when and where he was seen. Nothing bad is shown of him but haste and excitement. He was never seen near the girl except when her mother was present.

We wish to make this general remark as to all this class of testimony. It is all open to two constructions. None of it of necessity points to anything. Taken against a man suspected, it becomes suspicious; without extraneous aid, it is all entirely indifferent. But what was submitted in a former brief is all that need be said on this point.

We make no appeals; we crave right and justice. Give us a fair trial. We expect to meet all the evidence properly connecting us with this horrid crime. Against that we can take no exception. But if the jury were improperly influenced in their findings by incompetent testimony,

"—be it so much
As makes it light, or heavy, in the substance
Or the division of the twentieth part
Of one poor scruple;"

then we have a right to complain.

Lewis W. Clark, attorney general, in reply.

For all the legal purposes of this case the charge is unexceptionable, because there is no question before this court in regard to its correctness.

The testimony of Julianne Rouse. I. The defendant contends that the question is not whether this evidence is admissible for any purpose, but whether there is any purpose for which it is not admissible, and that the judgment should be reversed because this evidence is not competent to show that he killed the deceased. His claim is, that evidence of the degree of guilt should be excluded, unless it tends to prove every other part of the case; that evidence tending to show a homicide, "committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary," is incompetent, unless it also tends to show that the defendant is the murderer; that when a murder is committed in the perpetration of arson, robbery, or burglary, evidence of a

fire set, a pocket-book left open and empty in the highway, or a door or lock broken, is inadmissible if it does not bear upon every question into which the general issue may by ingenuity be divided; in short, that no evidence is admissible on any point unless it tends to prove every other point. I do not think I should be justified in occupying the time of the court with any answer to this part of the defendant's argument.

II. The defendant contends that the evidence was inadmissible, because no actual proof of a raping intent was made essential by any allegations or answer in pleading or proof; that the act of killing being fixed upon the defendant, his crime, without other proof of intent, would be murder of the first degree. Under the decision in *State v. Pike*, 49 N. H., 399, 404, 405, 406, it was not necessary to allege in this indictment the defendant's perpetration of, or attempt to perpetrate a rape. But, in order to convict the defendant of murder in the first degree, it was as necessary for the state to prove that degree of murder as if it had been necessary to allege it in the terms in which it is described in the statute. The first degree is no more presumed without proof of it, than a lower degree or a mere homicide without proof of it: *State v. Bartlett*, 43 N. H., 224; *State v. Jones*, 50 N. H., 369; *State v. Hodge*, 50 N. H., 510, 525, 526. The English presumption (accepted by the majority of the court in *Com. v. York*), that all homicide is malicious, is an error of old barbarous or semi-barbarous times not adopted here.

"Homicide may be lawful. It is well known to be so in many cases. In many more it is excusable or capable of extenuation; and if it may be so, if it often is so, whence the reason, where the justice, of attaching to that which may be lawful an inference of law that it is unlawful, and not only unlawful, but unlawful in the highest degree—or murder? Why does not the presumption of innocence attach as much to the motive, the intent with which an act is done, as to the act itself? Innocence means innocent of any unlawful act, as well as of any act at all. If the burden of proving the act itself is on the government throughout, is there not the same burden of proving the malicious intent? It is an evasion of the point to say that the latter is proved, because it is by law inferred from the wrongful act itself. That assumes the very question in dispute. Was the homicide unlawful? The government asserts it; the accused denies it. The principle that malice is to be legally inferred

from the commission of a 'wrongful act done intentionally without just cause or excuse,' does not help us in the solution of the question. The questions still remain, Was the homicide wrongful? Was it intentional or accidental? Was it done without just cause or excuse? In other cases, criminal malice is not always implied from the commission of a wrongful act. In many states it is made a crime maliciously to destroy or injure another's personal property; yet it is perfectly well settled that such an offense is not made out by simple proof of a voluntary and wrongful injury to, or destruction of such property. There must be proof of actual malice:" 1 Bennett and Heard L. C. C., 361 (2d ed.)

A legal presumption, that all homicides are malicious, could be based on nothing but the fact that homicides are generally malicious. But the fact is that not one in a thousand is malicious in a legal sense, *i. e.*, criminally malicious. Compare all the murders of Europe during the last hundred years with the number of deaths caused by the lawful orders of the first Napoleon. How long a time would be necessary to find as many persons murdered in this country as were lawfully slain in Virginia in 1864? War is not an exception. We are at war now, and have been nearly all the time since the first settlement of the country. War is, or is in law presumed to be, nothing but self-defense—a defense of rights which men may legally defend. Whether the right of defense be exercised by an organized community or by a single member of it; whether military powers join battle, or sheriffs inflict capital punishment, or rioters are shot, or other persons resisting authority are killed, or individuals take life for the prevention of atrocious crimes which cannot otherwise be prevented; whether homicide is committed under unavoidable necessity in the defense of private rights or the advancement of public justice—the principle is the same. And when so small a portion of homicides is unlawful, what ground is there for presuming them all unlawful?

Leave the military and the official destruction of life out of the account, and consider only private homicides. Many of them are so clearly lawful that they are never brought to the notice of a grand jury. And, when indictments are found, in how small a portion are there convictions of murder in the second degree; and how much smaller a portion are adjudged to be of the first degree. Vice and villainy of all kinds and degrees abound; but

a legal presumption that all homicide is capital crime would be a gross violation of truth, and a cruel oppression of the accused.

Our juries are always instructed that they cannot find the defendant guilty of the first degree of murder, unless they are satisfied by the evidence, beyond all reasonable doubt, that the defendant killed the deceased "by poison, starving, torture, or other deliberate and premeditated killing, or in perpetrating or attempting to perpetrate arson, rape, robbery or burglary." In this case the state undertook to comply with that requirement, in the first place, by proving by other evidence than that of Julianne Rousse that the defendant assaulted and killed the deceased; and, in the second place, by proving by a variety of evidence, including that of Julianne Rousse, that his assault upon the deceased was made with a raping intent. The defendant objects to evidence as unnecessary which tends to prove one of the intents necessary to the first degree. On the question of degree, the court tell the jury that the burden of proof is on the state, and they must be satisfied by the evidence beyond a reasonable doubt; the defendant asks that the verdict be set aside, because evidence was admitted to prove that point without proof of which his execution would be a judicial murder. The exclusion of evidence of intent would be the repeal of an elementary principle, and the sacrifice of a vital right of every person on trial for his life. From seeking such a subversion of law and justice, a convict is not deterred by its shocking inhumanity.

III. The defendant proposes the introduction of a distinction between "a mere incident" and "an element or the burden of the evidence." Such an amendment of the law would be an exceedingly attenuated refinement of legal language, and a perversion of legal principle. Proof of intent, motive, malice, or any mental condition, is competent when the intent, motive, malice, or mental condition, is a fact material in the case; and when such a fact is material, the proposed distinction between incident and element is immaterial.

IV. The defendant admits (what no lawyer would think of denying) that when the "*quo animo* becomes an essential factor in the problem of guilt or innocence to be solved," "such evidence of other like acts may be competent." What fact in this case is a more "essential factor," a more relevant and material fact, than the *animus*, the intent, with which the defendant

assaulted the deceased? At the trial, the question of that intent was for him an issue of life or death; and so it is now, and will be while this case remains in the hands of a human tribunal. His life depends on that intent. And in what sense would language be used, if it were said that a fact upon which the law makes his life depend is immaterial. His intent is as material as his life, which is the only thing against which the judgment runs, and against which the judgment would not run if the intent had not been proved at the trial.

In a great number of the decided cases in which evidence of the intent with which other similar acts were committed has been held competent, the defendant claims the intent was "peculiarly material." "In such cases," he says, "the intent is always material to be proven." Intent is either material or immaterial; and its materiality is a legal question. But, in admitting and rejecting evidence, the law does not proceed upon a distinction between evidence that is and evidence that is not "peculiarly material." And if there were a rule of evidence based on such an indeterminate distinction, what would be more "peculiarly material" in the defendant's case than an intent which is decisive of the question whether he shall live or die?

The defendant admits that when the criminality of an act depends upon the intent with which the act is done, the intent "may well be learned from other acts of the same kind." Homicide may be lawful; it may be unlawful; it may be a crime; it may be a moral and legal duty. Its character depends upon the occasion, the circumstances, and the intent. Of itself, it is as indifferent as any other act the guilt of which consists in intent: 4 Bl. Com., 176-188. If the defendant killed the deceased accidentally, and without fault, he is innocent. If he killed her in the necessary defense of his child, his act was meritorious. His raping intent may be proved, because it is material. It must be proved in order to convict him of a capital crime. If it had not been proved, I should have moved to set aside the verdict as a murderous mistake.

V. The defendant says: "Courts have no discretion in admitting or rejecting legal testimony," and "hanging ought not to go by discretion." In the bill of exceptions, the court, transferring "all questions as to the exercise of discretion," evidently used the word "discretion" in the technical sense in which it is used in legal decisions and arguments. Judicial discretion is

"the exercise of final judgment by the court in the decision of such questions of fact as, from their nature and the circumstances of the case, come peculiarly within the province of the presiding judge to determine." *Bundy v. Hyde*, 50 N. H., 116, 120. "Judicial discretion, in its technical, legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland*, 52 N. H., 401, 408. "No doubt there would be some limits as to time and circumstances beyond which evidence of uttering forged instruments on other occasions would not be permitted. What these limits are, it is for the judge in his discretion to determine." *Roscoe Crim. Ev.*, 95 (7th ed.) "In regard to the distance of time (or place) between the principal fact in issue and the collateral facts proposed to be shown in proof of the intention, so far as it affects the admissibility of the evidence no precise rule has been laid down, but the question rests in the discretion of the judge." 3 Gr. Ev., sec. 15, and authorities cited in my former brief.

VI. The competency of evidence of intent is not affected by the distinction between offenses that are and those that are not capital. When there were one hundred and sixty capital crimes, the question was not what offenses were, but what were not capital. Passing counterfeit money (third offense), trifling embezzlements by servants, insignificant thefts, and a great variety of petty delinquencies, as well as forgery, arson, robbery, burglary, etc., were punished by death: 1 Montague on Punishment, 82. The legislative reduction of the penalty is no reason for a judicial alteration of the rules of evidence increasing the difficulty of proving the criminal intent.

VII. In *Shaffner v. Com.*, 72 Penn. St., 60 (a case upon which the defendant relies), the judgment was reversed on the ground that the evidence of the defendant's having poisoned Sharlock was received as evidence that he poisoned his own wife Nancy. "In substance," say the court, "this was an offer to show that the prisoner poisoned Sharlock, as evidence that he also poisoned his own wife." It was held that there was no evidence of the defendant's previous purpose to marry Sharlock's wife Susan. The court say, "The previous purpose to marry Susan is the broken link in the chain to complete the connection, without which the deaths of both are not so probably connected as to make Sharlock's death evidence on the trial for the death of Nancy." If that decision were in point in this case, I should

insist that the adulterous intercourse between the defendant and Susan, and Sharlock's life insurance money, obtained by the defendant, left no such broken link; and that the decision was reached by weighing the evidence and drawing an inference of fact which could not be drawn by a court of law passing upon the legal question. But that decision has no bearing on the competency of proof of intent. The only question considered in relation to the competency of evidence was, whether the act of poisoning Sharlock tended to prove the act of poisoning Nancy. The jury were instructed that "if the prisoner is guilty at all, there can be no difficulty in ascertaining the degree of guilt, for, being by poison, it must necessarily be murder of the first degree, if purposely administered;" and that instruction was held right. The reversal of the judgment was based on a supposed broken link in the chain necessary to the inference of one act from another, and not on a violation of the rule that allows the intent of one act to be inferred from the intent of a similar distinct act: a rule which the court, in *State v. Renton*, 15 N. H., 169, 175, expressly declared they did not infringe.

VIII. When the defendant says, "No claim is made that the evidence helps to find intent only in so far forth as it helps to find a bent of mind or inclination to commit that kind of crimes," he misapprehends the argument which I endeavored to present in my former brief. The state claims that it is settled by all the authorities, and admitted by the defendant, that when the intent with which the defendant's act was done, or the intent with which he had possession of a person or thing, is a material part of a crime charged against him, evidence is admissible to show the intent of his acts on other occasions. The state claims that a raping intent is a material part of the crime charged against this defendant; that, under the circumstances of this case, without proof of such an intent, he could not be and ought not to be convicted of the first degree of murder; and that, under the specific instructions given by the court, the jury found, on other evidence than that of Julianne Rousse, that the defendant killed Josie Langmaid. With that verdict, the facts stated in the bill of exceptions show that he killed her, not by poison or starving, but by seizing her, taking possession of her, and making an assault upon her, and the state claims that, as matter of law, the intent with which he seized, took possession of, and assaulted other young women, is evidence of the intent with

which he seized, took possession of, and assaulted this victim. Whether the fact that he assaulted, killed, or had sexual intercourse with others, is evidence that he committed a like act upon the deceased, is not a question here. For the purposes of this case, let it be as well settled as the defendant may have reason to wish, that the fact of his having committed a certain act upon others, and his general disposition to commit such an act, are not legal evidence that he committed a similar act upon the deceased. It is equally well settled that his intent, in one act or possession, is evidence of his intent in another similar act or possession. The defendant admits that the law is so when the intent is peculiarly material. And if his intent, in this case, is not peculiarly material, there is no imaginable case in which it would be. Mere intent to kill is not criminal, and when a homicidal intent acquires a criminal character from the occasion, the circumstances or the motive, it does not carry homicide to the highest degree of guilt, except in the few cases specified in the statute. The defendant's intent to kill the deceased is not the gist of the capital offense of which he has been convicted. His raping intent is the fatal fact. To be fatal, it must be proved. The methods of proving it are prescribed by the general rules relating to intent, and not by those relating to acts.

There is no inconsistency when the law admits the special and peculiar intent of other similar acts of the defendant on other occasions as evidence of his intent in the act in question, and does not admit such other acts as evidence of the alleged act. In the former case, it may fairly be inferred that his similar acts on different occasions were done with like intent, though without any unity or continuity of plot. In the latter case, it would be a very different thing to infer an act on one occasion from his commission of similar acts on other occasions, without anything to show that they all came within one settled plan and fixed purpose. If a child—yours or mine—should mysteriously disappear, we might not think that the abduction of Charlie Ross tended to show that both children had been taken by the same person. But if the kidnaper of the Ross boy were proved to have taken yours or mine, and the question were with what intent he made the seizure, would anybody doubt that his proved intent to extort a ransom from Mr. Ross tended to show an intent to rob you or me in the same manner? What difference is there in the principles of evidence applicable to such cases, whether the vic-

tims are of one sex or the other, whether the alleged intent of the brigand is to make money by extorting ransoms from parents or by sending captives into slavery, as in *Com. v. Turner*, or to gratify some other passion than avarice, as in this case and in *State v. Evans*?

The intent of one act may be inferred from the intent of other similar acts, though the one act may not be inferred from the others. If it be said that the legal difference between such inferences is a mere difference in their strength, my answer is, that the law permits the stronger of the two, and does not permit the other to be drawn, and that my business here is to contend for the law as it is, and not to argue the question whether the law ought to be so changed as to tolerate both inferences or prohibit both.

The rule, which (with various qualifications and exceptions) forbids one act to be inferred from other similar acts, or (what is the same thing) from a general disposition, inclination or tendency to commit such acts, is found only in that small part of the world where the common law prevails. As suggested in *Darling v. Westmoreland*, pp. 407, 408, this peculiarity of English law may have been a piece of judicial legislation in mitigation of the indiscriminating and merciless severity of a criminal code of one hundred and sixty capital offenses. But I do not invite the court to investigate the origin of that rule; I do not argue that the reason of it has ceased, and that it is not adapted to a criminal code of a solitary capital offense; I do not ask the court to reject it on that or any other ground; but I do insist that, in our humane code, in the increase of crime, the new perils of the defenseless, the panic of parents, and the terror that reigns in many other places as well as on academy roads, in the constant obstruction and frequent defeat of justice by mistaken pity, sentimental influences, the general relaxation of principle, demoralization of society and decay of government, there is nothing that can induce the court to wish they had the power to change the law by excluding the defendant's intent in one act on the question of his intent in another similar act. How fearfully such a change would cripple the arm of justice, and endanger private rights of person, reputation and property, they who have been engaged in the administration of the criminal law well know. We need all the just, reasonable and efficient means now available for detecting, convicting and punishing the lawless, and

restraining the elements of society that are hostile to its welfare. No competent evidence can be spared. An inference as to the defendant's intent in one act, may be drawn from his intent in other similar acts. That rule cannot be safely annulled. I contend for it, as law, imperatively required by reason and justice, indisputably established by the authorities, and explicitly admitted by the defendant, and I anxiously hope that my successors may not be disabled in the performance of their duties by the abolition of a rule so necessary for the protection of the community.

CUSHING, C. J. The testimony of Fowler, Mahair, the Towles, the Watsons and Mercy was, I think, properly admitted. It all tended to show that the prisoner, about the time of the murder, was frequenting that neighborhood with a view to the commission of the crime of rape upon the person of some one of the young females whom he knew to have occasion to pass over that road. The obscene and filthy language he is described as using, in connection with his inquiries about one of the young ladies, tends to show what thoughts were in his mind, and what he was meditating. The testimony of the Watsons and Mercy tends to show, not merely an attempt or design to commit the crime on the person of Miss Watson, but also to show generally, in connection with the other testimony, that he was prowling about that place for the purpose of lying in wait for any person whom he might sacrifice to his base and cruel designs. It furnishes an illustration of the doctrine which I shall attempt to illustrate and maintain. The attempt to commit one offense may be put in evidence when attended with circumstances which give it a logical connection with the fact in issue, and not otherwise.

The admission of the testimony of Julianne Rousse gives rise to by far the most important question in the case. That testimony tended to prove that the prisoner, about four years and a half before the trial, at a place beyond the jurisdiction of the United States, committed the crime of rape upon a person other than the deceased; and the question is, whether that bald, naked fact, being put in evidence, had any tendency to prove any matter in issue between the state and the defendant.

These questions in regard to the relevancy of particular items of testimony always depend upon the peculiar circumstances of the case, and must be solved by the application of sound judg-

ment and common sense. It very often happens, as practical men in the profession well know, that facts, which in one state of the evidence and one aspect of the case are entirely irrelevant, suddenly, by a slight change in the conditions, become of great importance. Hence the necessity, which so often happens in attempting to take written testimony, of introducing into a deposition so many facts which at first sight seem entirely irrelevant, but which may become admissible and important; hence, too, one reason why in criminal causes it is so important that the witnesses should testify in open court, and in the presence of the respondent, in order that all their knowledge should be available to meet all the exigencies of the trial.

It is for this reason that so many reported cases in the law of evidence are valuable, not so much in establishing principles of law, as for the illustration of those principles.

There is a great mass of cases so similar in their circumstances, and which have occurred so often, that they may be taken as evidence of the application of the common sense and cultivated reason of a great many individuals, and so come to have the force and authority of established law.

I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determine its relevancy. I take it to be generally true, that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the state, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue. It may be, that in some cases the danger resulting from such indirect bearing might be so great in comparison with its importance in regard to matters on which its bearing was legitimate, that it ought not to be admitted. But I think the general rule is that no testimony which has a legitimate bearing upon any point in issue can be excluded.

I say *legitimate bearing* advisedly, because, as already suggested, although undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish

evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called *common* sense, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy.

It is proper, however, in the outset, to notice what appears to me to be a fallacy in the very commencement of the able argument for the state. It says: "Under an unexceptionable charge, and upon other testimony than that of Julienne Rousse, the jury have answered the first question (*i. e.*, Did the defendant kill the deceased?) in the affirmative." If it could be known certainly that the jury did not give any weight to the testimony excepted to in determining whether the prisoner did the act; if it could be certainly known that the evidence of Julienne Rousse did not create in the minds of the jury a prejudice against the prisoner on all the points of his case—the remark might be well founded. But that is just what we do not and cannot know, although what we do know of the constitution and temper of juries creates in us a very strong belief of the contrary.

In this case I understand it to be conceded by the government that the evidence is not relevant for the purpose of showing who killed the deceased, but that it is claimed to be relevant for the purpose of showing the particular act that he was engaged in doing when he committed the murder. For the purpose of showing the offense to be murder in the first degree, it is claimed to be relevant as tending to show that he committed the murder while in the act of committing rape; but as the intent is the mysterious solvent which opens the way for the admission of the testimony, it would not be relevant for the purpose of showing that he had first committed a rape, and then did the murder afterward.

Proceeding, then, to consider what has been settled in this matter, I think we may state the law in the following propositions:

1. It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.

2. It is not permitted to show the defendant's bad character by showing particular acts.

3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.

4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions.

It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*.

Of course, if the respondent sees fit to put his character in issue by offering evidence tending to show that it is good, it is then permitted to the prosecution to rebut this testimony by showing that it is bad; but I think the weight of authority is to the effect that this must be done by evidence, not of particular facts, but of reputation.

The law in regard to proof of intent is, I apprehend, in no particular different from the law in regard to the proof of other facts, unless it may be in the general principle that a person is ordinarily presumed to intend the natural consequences of his actions. But always the evidence will be subject to the condition that it legally and logically tends to prove the facts in issue, whether it be the intent or any other fact.

The foregoing positions are illustrated, and I think established, by the following citations:

"Where a defendant has voluntarily put his character in issue,

and evidence for the prosecution has been introduced, it has been said the examination may be extended to particular facts, though this has lately been denied by courts of high respectability; and certainly it is very oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal a series of independent facts, forming such a constituent offense:" 1 Wharton's Am. Crim. Law, and cases cited, sec. 637.

"While, however, bad character cannot be put in issue by the prosecution, it is permitted to introduce evidence of prior misconduct, where it is relevant either to prior malice towards an individual, or guilty knowledge:" Wharton, sec. 639, and cases cited.

"But in other criminal cases the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so by calling witnesses in support of it, and even then the prosecutor cannot examine into particular facts, the general character of the defendant not being put in issue, but coming in collaterally:" Buller's Nisi Prius, 296.

"But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character:" *Com. v. Webster*, 5 Cush., 325.

It will be seen that these authorities support not only the first proposition above stated, but also the others.

I also cite the following authorities in support of the other propositions, which, it seems to me, need no further support.

"It is here, however, that the fundamental distinction begins, for while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove, either in this or any other way, that the defendant had a tendency to the crime charged. Thus, in England, it has been held that, on the trial of a person charged with an unnatural crime, it was not permitted to prove that the defendant had admitted that he had a tendency to such practices; and so, on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits as to punishing other slaves is not admissible for the prosecution:" 1 Wharton's Am. Crim. Law, sec. 640, and cases cited.

"So, proof of a distinct murder, committed by the defendant at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time,

in which the defendant participated, cannot be admitted until proof has been given establishing or tending to establish the offense with which he is charged, and showing some connection between the different transactions, or such facts or circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by, some circumstances connected with the former, in which case such circumstances connected with the former as are calculated to show the *quo animo* or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction are competent and legitimate testimony:" 1 Wharton's Am. Cr. Law, sec. 647, and cases cited.

In *Regina v. Oddy*, 4 Eng. L. and Ec., 572, it was held that "on an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment but belonging to a different owner, and that those goods had been stolen from such owner."

Lord Campbell, C. J. "I am of opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offenses as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time that he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes, of allowing evidence to be given of the uttering other forged notes to different persons, has gone great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case with regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction, therefore, must be quashed:" *Regina v. Oddy*, 4 Eng. L. and Ec., 574.

In *Shaffner v. Commonwealth*, 72 Pa. St. (13 Am. Rep.), the

prisoner was indicted for the murder of his wife by poison. There was evidence of his criminal intimacy with the wife of S., on whose life was an insurance, the proceeds of which, on his death, the defendant had tried to procure. Held, that evidence that S. died with the same symptoms as the defendant's wife, and had been attended by the defendant, was inadmissible.

Agnew, J., in his opinion, said, "It is a general rule, that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt, on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime, yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or, it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt:" *Shaffner v. Commonwealth*, 13 Am. R., 651.

"It is, therefore, not competent for the prosecutor to give evidence of facts tending to prove another distinct offense, for

mitted until
establish the
connection
circumstances
out of, and
connected
connected
o animo or
influenced in
and legiti-
e. 647, and
as held that
owing them
prosecutor, in
in evidence
f the prose-
e same sort
o a different
ch owner."
ne evidence
ts as it was
ow that the
commit such
the law of
der to raise
by the per-
ived in the
v that these
ceived them.
etments for
be given of
as, has gone
rule applied
We are all
with regard
d no ground
e conviction,
Eng. L. and
n. Rep.), the

the purpose of raising an inference that the prisoner has committed the crime in question; nor is it competent to show that he has a tendency to commit the offense with which he is charged. Thus, on a prosecution for an infamous offense, an admission by the prisoner that he had committed such an offense at another time was held to have been properly rejected: *Rex v. Cole*, cited in 1 Phillips on Ev., 499 (8th ed.):" *State v. Renton*, 15 N. H., 174.

The case of *People v. Corbin*, 56 N. Y., 363, well illustrates the practical application of this doctrine. The indictment was for forging the indorsement of one Van Amburgh on a promissory note. The defense was, that the prisoner was authorized to sign Van Amburgh's name. The prisoner had had such authority, but the prosecution attempted to show that the authority had been revoked. The question of the prisoner's guilt or innocence depended upon the inquiry whether the prisoner honestly believed that he was authorized to make the indorsement, or whether he knew that the authority had been revoked, and signed Van Amburgh's name with criminal intent. To establish such intent, evidence was offered tending to show his acknowledgment that he had made a similar unauthorized use of the name of his father-in-law on other notes. The county judge charged the jury as follows: "While the proof that he has been guilty of other forgeries is not evidence upon which you are to convict him of this forgery, yet the proof of other forgeries in connection with this, so far as they are in the case, you have the right to consider, in determining what his intentions were at the time this paper was made and uttered. So far, you may consider all that character of evidence in the case, in determining the intent at the time this paper was made and uttered." The judge also, in his charge, said, "The fact that the defendant is guilty of other forgeries is no evidence to prove that he committed this forgery. So far as his admissions to Ganoung concede the commission of forgeries against Ganoung, they may be considered by you in determining what was his intent at the time this note was made and uttered."

The verdict was set aside, and a new trial granted.

Rapallo, J., in delivering the judgment of the court, said: "The cases in which offenses other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few; and this, we think, is not

one of them. The fact that the prisoner made an unauthorized use of the name of Ganoung, if established, shows that he was morally capable of committing the same offense against Van Amburgh, but does not legitimately tend to show that he did so, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question had been made with criminal intent:" *People v. Corbin*, 15 Am. R., 429.

The cases which have been cited by counsel for the government afford full illustration of the principles laid down in what has been said before.

It is proper, however, to remark what seems to me to be a fallacious use of the word *intent*. Ordinarily, intent is, I think, an inference of law from acts proved. The maxim is, that every man must be taken to intend the natural consequences of his act; and if he knowingly and voluntarily does an act which is in violation of law, he is held to have intended to violate the law. This I think would be true, whether he did or did not know that the act was unlawful. Thus, if a man should knowingly and voluntarily utter a forged bank-note, or a counterfeit coin, he would be held guilty whether he did or did not know that the act was unlawful.

The cases cited by counsel for the government admit of being classified into several distinct groups.

In the first place is the class of cases in which other offenses are shown for the purpose of proving guilty knowledge. To this class belong those cases in which, in the trial of indictments for uttering forged bank-notes, or counterfeit coin, the proof of other offenses of the same kind is admitted. It might well happen that a person might have in his possession a single counterfeit bill or coin without knowing it to be such; but he would be much less likely to do so twice, and every repetition of such an act would increase the probability that he knew that the bills were counterfeit. If he did know it, the guilty intent would be an implication of law, and not an inference of fact. To this class belongs the case of *Reg. v. Roebuck*, cited in the brief.

Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental, *e. g.*, where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where children

of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable.

So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely.

So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents.

So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased. To this class of cases belong *Rex v. Voke*, *Reg. v. Geering*, *Reg. v. Cotton*, *Reg. v. Roder*, *Rex v. Mogg*, *Reg. v. Dossett*, *Reg. v. Bailey*, *Reg. v. Proud*, *Reg. v. Richardson*, cited in the brief for the prosecution.

There is another class of cases in which proof of the commission of one crime tends to show a motive for the commission of the crime with which the prisoner is charged.

"A. was indicted for the murder of H. It was opined that A., having malice against P., had hired H. to murder him, and that H. did so; but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P., and it was held that the prosecutor might also give evidence to show that H. was in fact the person by whom P. had been murdered." *Rex v. Clewes*, 6 Car. and P., 221; Littledale, Har. D. 1, 1942.

"On trial of the prisoner for the murder of his wife, in the absence of direct evidence, proof of an adulterous intercourse between the prisoner and another woman is admissible, to repel the presumption of innocence arising from the conjugal relation." *State v. Watkins*, 9 Conn., 47; 2 U. S. D., 288.

So, in *Com. v. Ferrigan*, the adulterous intercourse of the defendant with the wife of the deceased tends to show a motive for the murder.

In cases of indictments for obtaining goods under false pretenses, it very often happens that the respondent has been in

some kind of business of which buying and selling goods on credit makes a part; and in such case the difficulty is to draw the line between the points where legitimate business ceases and fraud begins. In such cases a single purchase of goods on credit might happen in the ordinary course of business; but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew that he was in failing circumstances, and that he did not intend to pay for them, or expect that he should be able to do it. Of course the effect of such testimony would depend upon the number and amount of such purchases, the after disposition of the goods purchased, and all the other circumstances. To this class belong the cases of *Com. v. Eastman*, *Bradley v. Obear*, and *Hovey v. Grant*.

Another class of cases consists of those in which the evidence tends to show a general plan or conspiracy, one act of which was that which is in issue. To this class belong *Mason v. The State*, and perhaps *Com. v. Turner & Shearer*.

If the indictment were for being a common seller of spirituous liquor, the charge could be proved in hardly any other way than by showing many specific acts; and conversely, if a man were proved to be a professional counterfeiter, that would be evidence tending to show his guilty intent. Of this description are *Rea v. Balls* and *Com. v. Edgerly*.

In the case of sexual crimes, as fornication and adultery, where the object is to prove that the respondent has committed the crime with a particular individual, evidence tending to show previous acts of indecent familiarity would have a tendency to prove the breaking down and removal of the safeguards of self-respect and modesty, and the gradual advance, step by step, to the crime. Proof of the actual commission of the same crime would still more strongly tend to show the removal of those safeguards, and still more to make probable the commission of the crime on trial. To this class belong *Com. v. Horton*, *Com. v. Thrasher*, *State v. Wallace*, *State v. Marvin*, *Com. v. Merriam*, and *Com. v. Luhey*.

It should also be remarked that, this being a matter of judgment, it is quite likely that courts would not always agree, and that some courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the courts have always professed to put the

admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other.

In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon *Julienne Rousse* and the murder of *Josie Langmaid*, as the law requires. I am unable to see any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude. Proof of the first crime would show that the respondent was a very bad man—would perhaps show a tendency or disposition to commit that particular crime; but it would go no further, and in fact would amount to little more than an attack upon the respondent's character, which is inadmissible unless he puts it in issue, and an attack upon his character by showing particular acts, which is also inadmissible.

There is another consideration which makes necessary the extremest caution in the admission of this kind of testimony, and that is, the hardship which would be imposed upon the respondent by raising such collateral issues, and the great complication which might be introduced into the trial. I do not by any means intent to assert that this consideration is conclusive. I do not see how, if the collateral fact has a legal tendency, on the principles I have stated, to prove the fact in issue, it can be excluded.

It seems to me clear that, if the evidence of the rape of *Julienne Rousse* were admissible, it would be equally admissible to prove the commission of any other similar offense, and that the government would not be confined to direct evidence of the fact.

We learn from the newspapers of the day that there is a vehement suspicion that the same person who murdered *Josie Langmaid* murdered *Miss Ball* at *St. Albans*, and it would be equally admissible to try that case and show that fact as the other. The necessity of proving that fact, partly or wholly by an elaborate combination of circumstantial evidence, would not, that I can see, make it any the less admissible. It would certainly be an extreme hardship on the prisoner to compel him to enter upon such an investigation. I mention this case to illustrate the neces-

sity of extreme caution not to admit such testimony unless there can be seen some distinct logical connection, such as the law requires, between the fact proposed to be proved and the fact in issue.

In the case of *State v. O'Brien*, 119 Mass., 342, the law in regard to the admissibility of evidence as to character is very fully and satisfactorily discussed. The distinction that the term *character* concerns what the man is, and the term *reputation* concerns what is said of him, is kept plainly in view; and it is clearly shown that the only legitimate mode of proving character is by showing reputation.

Now, I think a careful examination of that part of the charge which relates to this evidence will show that it really, in substance, amounted to instructing the jury that they were to find the character of the prisoner from the fact proved by Rousse, and infer from such character that he would be likely to be actuated by passion and lust. It was really instructing the jury that they might find, from a particular act proved, the prisoner's character as a man possessed by unlawful and lustful passion, and infer from that that he was actuated by such passion in his conduct to the deceased. The matter really reduces itself to attacking the prisoner's character by the proof of particular acts, which the authorities clearly show to be inadmissible.

This portion of the charge, though not expressly excepted to, is mentioned as showing the particular view with which the evidence excepted to was admitted.

LADD, J. "All murder committed * * * in perpetrating or attempting to perpetrate rape * * * is murder in the first degree." Gen. Stats., ch. 264, sec. 1. The state claimed (1) that the prisoner murdered Josie A. Langmaid; and (2) that the murder was committed in perpetrating, or attempting to perpetrate upon her, the crime of rape. Both these facts were put in issue by the plea of not guilty. It was for its supposed bearing on the second issue that the testimony of Julianne Rousse was admitted, and the judge who charged the jury guarded against any other application of the evidence, so far as a direction from the bench could have that effect upon the minds of the jury. The ground upon which the jury were told they might consider it, in determining whether the prisoner was perpetrating or attempting to perpetrate a rape when he committed the murder,

was, that it bore upon the question of intent, and the ingenious, not to say subtle, argument of the attorney-general rests wholly, as I understand it, on the same ground. He says, "If he (the prisoner) had passed counterfeit money at the time and place when and where he raped Julianne Rousse, and other counterfeit money had been found in his possession at the time and place when and where he killed Josie Langmaid; if he had got a negro boy into his possession at the former time and place with intent to send him into slavery, and had got another negro boy into his possession at the latter time and place, would there be any doubt that his intent on the former occasion would, in fact, be considered by every intelligent member of the human family as entitled to some weight on the question of his intent on the latter occasion? * * * What is there in the act, the circumstances, or the intent of kidnaping, or passing counterfeit money, that makes us feel the probative force of the proved intent of one occasion upon the question of intent four years and four months afterwards, and prevents our feeling any probative force of such evidence in the present case?" Starting, then, with the claim that this evidence was admissible upon the question of intent, it is necessary to understand just what intent is meant. Was it an intent to commit the crime of murder? Certainly not. That crime must be fully made out, as the learned judge correctly told the jury, by other and entirely independent evidence. He said, "It is a fundamental principal of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense. This principle we must take care not to violate. And, therefore, you are not to regard the evidence of Julianne Rousse as any proof or evidence that the prisoner killed Josie Langmaid. Therefore, unless you find from *other* evidence, entirely independent of that of Julianne Rousse, that the prisoner killed and murdered Josie Langmaid, you must reject her evidence altogether." This, of course, covers all questions of intent, so far as regards the crime of murder.

Was it an intent to commit murder in the first degree? The answer to this is surely in the negative. Such a general intent could only be shown by evidence of a deliberate and premeditated killing in one of the ways pointed out by the statute, or otherwise. Besides, this question, like the other, seems to be fully answered by the charge. The jury were told that "the

e ingenious, rests wholly, "If he (the he and place r counterfeit he and place e had got a d place with er negro boy ould there be ould, in fact, human family intent on the t, the circum- rfeit money, yed intent of ars and four obative force hen, with the e question of ent is meant. r? Certainly earned judge ependent evi- of law, that se cannot be istinct offense. and, therefore, Rousse as any ie Langmaid. entirely inde- mer killed and evidence alto- intent, so far degree? The general intent and premedi- the statute, or e, seems to be old that "the evidence is open to your consideration, if at all, only so far as it may seem to you to bear upon the *character* of the homicide of Josie Langmaid; only as it may bear upon the question whether she was murdered by the prisoner in perpetrating, or attempting to perpetrate rape." The intent, then, which it is claimed this evidence was admissible to establish, was an intent to perpetrate, or attempt to perpetrate, the crime of rape upon Josie A. Langmaid at the time he murdered her. But an intent to perpetrate rape, or to attempt the perpetration of that crime, is not what the statute requires to make the killing murder in the first degree. The most that can be said is, that intent may constitute an element in those crimes, as in most others. To meet the requirement of the statute, the act as well as the intent must be shown. The whole crime of perpetrating, or attempting to perpetrate, rape must be made out, and that includes all questions of intent that may be involved. Was he in the act of perpetrating or attempting to perpetrate rape at the time he did the killing? To this the state said yes; the prisoner, no. Here was a clear and distinct issue; just as clear and just as distinct as though there had been nothing else in the case. The state charged rape, or an attempt to commit that crime, as the basis of their claim that the verdict should be murder in the first degree. This charge they must prove, or the claim based upon it fails. The question is, how is it to be proved? What is the rule of evidence to be applied? Is evidence to be received upon the trial that would be inadmissible if the charge were rape alone? If so, upon what ground? What principle of law, or logic, or humanity, will admit evidence to prove rape when the consequence of a finding against the prisoner is death, and exclude the same evidence when the consequence is only loss of liberty? I do not know whether the argument for the state holds that a distinction in this respect should be made. Certainly, the ingenuity and industry of the attorney-general have failed to point out any ground upon which evidence that would be inadmissible to prove rape upon the trial of an indictment for that crime alone, can be received to prove rape when charged on the trial of an indictment for murder in the first degree, and relied on by the state as an essential element of that offense under the statute. And I confess it is impossible for me to imagine the shadow of a reason upon which such a claim could be sustained were it put forth. What, then, is the question presented by this

exception? Clearly, no other than this: was evidence that the prisoner committed rape upon Julianne Rouse, in Canada, in 1871, legally admissible to show that he committed or attempted to commit rape upon Josie A. Langmaid, at Pembroke, in 1875? There was no question as to the defendant's physical strength and ability to commit the crime of rape. By no refinement, therefore, can *State v. Knapp*, 45 N. H., 148, be said to apply. There is no room nor occasion to argue that the actual perpetration of rape upon one woman tends to show physical strength sufficient to commit the same crime upon another. No such connecting link is in the case. The simple naked question is that just stated, namely, can evidence that he committed rape upon one woman be received as evidence from which the jury may find that he committed rape upon another?—the two events being entirely independent and distinct—no way connected in time, or place, or circumstances, and we cannot, in my judgment, suffer that question to be changed in form, or to be covered up and disguised by vague and general observations as to the matter of intent, however astute and plausible, without imminent danger of losing our way in a wilderness of fallacy and error. The answer to that question is to be sought for in the recognized authorities of the common law; and I must say, that if there is any break in those authorities, any want of unanimity in the answer which they give, I have failed to discover it. Doubtless some of the cases to which we have been referred run pretty near the line. But no court has yet said, to my knowledge, that the commission of one crime is legal evidence of the commission of another, when there is no connection of time, or place, or circumstance, or intent between the two, except that the commission of the first tends to show a heart capable of committing the second.

This very question was answered in the same way, as it seems to me, by the learned judge, when he said: "It is a fundamental principle of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense."

But it is nevertheless argued on behalf of the state (if I have not wholly misapprehended the drift of the argument), that the evidence was admitted because, *as matter of fact*, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life.

The learned attorney-general says: "The question of fact here is, whether, on those grounds of natural law, natural reason, and human experience, upon which such a question of fact must be decided, the intent with which the defendant assaulted Julieanne Rousse is capable of affording any light on the intent with which he assaulted the deceased. * * * It will be admitted, I suppose, that every intelligent person, untrammelled by technical rules, will concur in the opinion of the circuit court. And the question being one of pure fact unmingled with law, and therefore not subject to technical rules, on what ground will any one dissent from the unanimous judgment of the rest of mankind?" And further, that unanimous judgment "is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention, a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness."

I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature—the teaching of human experience.

If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the state would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime

again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. Yet, does the law permit the credit of a witness to be impeached by showing individual acts of falsehood? We do not and we cannot believe a known liar the same as we believe a known man of truth. Why, then, ought not evidence showing that a witness has lied on any particular occasion to be received, in order that we may weigh the credit of his testimony by rules derived from human nature and experience, such as we naturally and instinctively apply in the other affairs of life?

Suppose the general character of one charged with crime is infamous and degraded to the last degree, that his life has been nothing but a succession of crimes of the most atrocious and revolting sort, does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise. It is the law that the prisoner shall be presumed innocent until his guilt is proved. It is the law that his bad character shall not be shown by the state until he has put that matter in issue by attempting to show good character for himself. It is the law that the credit of a witness shall not be impeached by showing specific instances of falsehood against him. And it is the law that evidence of the commission of one crime shall not be received to show the commission of another when there is no connection between the two. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether it affords too great protection to the criminal or too little to the community, are not questions with which we have to do. It has been thought that to confront a man on trial for a crime that involves no more than his liberty and property with every act of his former life, and require him to purge himself from the suspicion of guilt which may be raised by the testimony of witnesses to individual instances of alleged wrong-doing, would be not only oppressive and unfair, but arbitrary and inhuman.

The rules of the common law in reference to the detection and punishment of crime, which are the growth of ages, and embody the practical wisdom and experience of many great and learned

men, carry upon every page unmistakable evidence that they were devised as well to shield the innocent as to punish the guilty. Throughout they recognize the fact that innocent men may be accused of crime. A highly wrought condition of the public mind, the popular horror and indignation that arise upon the commission of a dreadful crime, are not favorable to the calm and dispassionate application of a just and humane law. They do not always leave the vision clear. But popular clamor, however loud, cannot be permitted to invade this place without imperiling the most sacred rights of the innocent as well as the guilty. The rule which we apply in the trial of a wretch who has ravished and killed an innocent girl, and then, with the incarnate spirit of a fiend, torn and cut and mutilated her body in a way that causes the blood to curdle and the heart to rise in almost uncontrollable rage, is the same rule which we must apply in the trial of the innocent victim of a wicked and audacious conspiracy, or of one who, without fault, has become entangled in a mesh of circumstances which threaten an innocent life.

I think the admission of the testimony of *Julienne Rouse* was error, because it violated the fundamental principle of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense. The other exceptions, I think, should be overruled, for the reasons given by the attorney-general in his brief.

SMITH, J. The jury were instructed that the testimony of *Julienne Rouse* should be considered by them only so far as it might seem to them to bear upon the question whether *Josie Langmaid* was murdered by the prisoner (if they should find from other evidence that he did murder her) in perpetrating or attempting to perpetrate rape. The question at once arises whether her evidence had any legal tendency to prove the character of the homicide.

It was correctly stated by the presiding judge at the trial to be "a fundamental principle of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense." There are seeming exceptions to this rule, as when guilty knowledge is an ingredient of the crime, or the intent with which a particular act is done is material. These exceptions have been very clearly classified by the chief justice, and I shall not attempt to go over the same ground,

except incidentally, in what I may have occasion to say. The exceptions will all be found, I think, to be governed by principles that exclude this case from their operation.

The great objection to admitting such evidence is the injustice that would be done thereby, which is very forcibly stated by Allen, J., in *Coleman v. People*, 55 N. Y., 90: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."

It is always competent for the government to introduce evidence of any facts tending directly to show an evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence, or in necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible: *Com. v. Tuckerman*, 10 Gray, 198. In that case the rule is laid down that such evidence should have a peculiar and intimate, if not also an inseparable connection with, and tending to explain and characterize, the act in issue charged against the prisoner, and is only admissible on the question of intent.

So in *Com. v. Campbell*, 7 Allen, 542, it was held that such evidence is inadmissible where the offense charged and that offered to be proved are distinct.

In our own case of *State v. Renton*, 15 N. H., 174, it was very clearly held that it is not competent to show that the respondent had a tendency to commit the offense with which he was charged.

The charge made by the state is, that this respondent killed the deceased in perpetrating or attempting to perpetrate a rape upon her. As having some tendency to show that he committed or attempted to commit a rape upon Josie Langmaid, the state was permitted to show that four years and more previously he had committed a rape upon Julianne Rousse, in Canada. Had

the testimony any such tendency? There was obviously no connection whatever between the two offenses or transactions, either in the persons upon whom the crimes were committed, or in the places where or times when committed. The evidence of Julianne Rousse, at most, would only show that the respondent was depraved enough to commit the crime of rape, or that he possessed a lustful desire in his heart which he, on that occasion, did not hesitate to gratify by violent means.

But how does the fact that the respondent committed a rape more than four years previously, in Canada, upon another person, have any tendency to show the intent with which he killed Josie Langmaid? It is not claimed that he killed her to enable him to commit a rape; the rape preceded the killing, and the killing was done to conceal the rape.

Suppose the respondent had committed only the crime of rape upon Josie Langmaid, and then had spared her life, I think no case can be found that would authorize the state, upon the trial of an indictment against the respondent for the rape, to give in evidence the rape committed upon another person more than four years previously. No case of a more marked and distinct offense, as to time, place, victims and circumstances, can be found. How, then, does such evidence become any more relevant when the trial is upon an indictment for killing while committing a rape?

Lord Mansfield has expressed the rule in these apt words: "When an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in case of failure thereof, the law implies a criminal intent."

Thus, upon the charge of passing counterfeit money, proof that the respondent knew it was counterfeit is necessary, as showing the intent with which it was passed. Upon the charge of obtaining goods under false pretenses, proof of fraudulent intent is necessary. Upon the charge of murder, the killing being proved, the malice is implied in the absence of any explanation by the prisoner of the act. In this case there was no connection whatever between the rape of Julianne Rousse in 1871 in Canada, and the murder of Josie Langmaid in New Hampshire in 1875. There can be no pretense that they are continuous parts of one transaction; that when the rape was committed

upon Julianne Rousse, in 1871, the prisoner had any design to commit a rape upon or to murder Josie Langmaid, or any other woman, in 1875. The two acts are so wholly distinct and separate, that when the prisoner formed the design of committing a rape upon Julianne Rousse, and carried that design into effect, in 1871, he did not and could not, as a part of that evil design and act, or as a consequence thereof, have then premeditated the murder of Josie Langmaid, or the perpetration of rape upon her.

No point is better settled than that the state cannot give evidence of the bad character of the respondent, unless he shall first put his character in question by introducing evidence in support thereof. As the only effect of the state's introducing evidence of another rape by the respondent is that it tended to show that he possessed a disposition to commit that particular crime, a disposition which would incline him to the perpetration of rape whenever the opportunity might occur, how does such testimony differ from that of evidence as to the prisoner's bad character, before he has elected to put it in question, and that, too, by introducing proof of an isolated fact?

The whole answer to the position, that the evidence of Julianne Rousse was relevant to the issue tried, is that it does not show or tend to show that the prisoner perpetrated or attempted to perpetrate a rape upon Josie Langmaid. Proof that he committed a rape in Canada, four years previously, upon Julianne Rousse, shows what? Not that he then had any design or intent to perpetrate a rape four years afterwards upon another woman whom he had never seen or heard of, or in a place two hundred miles distant where he had never been; not that he had then formed a design to rape and murder women whenever he might have opportunity; not that he had ever before or since committed that crime; but that the defendant had a disposition to commit the crime of rape four years previously. No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he has at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime.

The trouble with the position of the state is that it is not a

question of *motive* or *intent*. Certainly, committing a rape in Canada in 1871 would not show any motive for committing a rape in New Hampshire in 1875; nor does it disclose any intent so to do. Evidence tending to prove collateral facts is admissible only when it has a natural tendency to establish the fact in controversy, or to corroborate other direct evidence in the case: *Com. v. Merriam*, 14 Pick., 518. So, in *Com. v. Ferrigan*, 44 Penn. St., 386, in a trial for murder, evidence that an adulterous intercourse between the wife of the deceased and the prisoner had existed and continued to near the time of the homicide was received, on the ground that one crime furnished a motive for the other. In *People v. Wood*, 3 Parker Crim. Cas., 681, which was a trial for murder, proof of other crimes than that alleged, *but connected with it by unity of plot and design*, and influenced by a single motive, was held admissible.

In *State v. Renton*, 15 N. H., 174, Gilchrist, J., very aptly remarked: "Where a person is charged with an offense, it is important to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to be prepared to answer. It is, therefore, not competent for the prosecutor to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference that the prisoner has committed the crime in question. Nor is it competent to show that he has a tendency to commit the offense with which he is charged. Thus, on a prosecution for an infamous offense, an admission by the prisoner that he had committed such an offense at another time was held to have been properly rejected: *Rex v. Cole*, cited 1 Ph. on Ev., 499 (8th ed.) The case of the respondent is to be tried upon its own merits. * * * It is argued that reference may be made to what was done on a former day, that this transaction may then be compared with that, and thus may acquire a certain character. But then, if found guilty, he would be so, not so much because what he did was wrongful in itself, but because his conduct on this occasion was like his conduct on some previous occasion. * * * By comparing one with the other, we establish the guilt of the respondent by arguing in a circle. But this is to be shown by proof of what he did on the present occasion."

So, in *East Kingston v. Tonle*, 48 N. H., 57, which was an action against the owner of a dog alleged to have been concerned

in killing sheep, Perley, C. J., said (p. 65): "We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief, it is not competent to prove that he had done similar mischief before, more than it would be to prove that a defendant sued for an assault and battery had beaten other men before, or the same man."

In *State v. Prescott*, 33 N. H., 212, which was an indictment for keeping a gaming-house, the allegation in the second count was confined to a single day, and it was held that the government could not prove, for the purpose of charging the defendant on that count, that the crime was committed on more than one day, although evidence covering a longer time would be admissible for the purpose of showing what character the house had on the particular day when it was sought to prove that the offense was committed.

In *State v. Wentworth*, 37 N. H., 197, evidence that the prisoner placed on the railroad track obstructions other than those for which the indictment was found was held competent, upon the ground that the acts were so connected that they might be regarded as being the continuation of the same transaction. But the fundamental rule, that the evidence of another distinct offense could not be shown for the purpose of raising an inference that the prisoner has committed the crime with which he is charged, was distinctly recognized.

The testimony of the other witnesses excepted to is free from the objection made to that of Julianne Rousse. They all testified to facts which tended to show that the respondent was forming in his mind a plot to commit the crime of rape upon some one in the vicinity of the place of this homicide. No lustful desire or particular animosity or malice against Josie Langmaid need be shown. She became the victim of his lustful passion, and his evil designs were consummated in the attack which deprived her of life.

But because of the admission of the testimony of Julianne Rousse, there must be

A new trial granted.

McNAIR v. STATE.

(53 Ala., 453.)

RAPE: Force—Erroneous charge.

Force is an essential ingredient in the crime of rape, and a charge that if the defendant intended "to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged," is erroneous.

MANNING, J. In *Lewis v. The State* (30 Ala., 54), decided in 1857, a prosecution of a negro slave for rape, or attempting to commit rape, by personating the husband of a married white woman, and so effecting, or endeavoring to effect, illicit sexual intercourse with her, this court said:

"It is settled by a chain of adjudications, too long and unbroken to be now shaken, that force is a necessary ingredient in the crime of rape.

"The only relaxation of this rule is, that this force may be constructive.

"Under this relaxation it has been held, that where the female was an idiot, or had been rendered insensible by the use of drugs or intoxicating drinks, * * * she was incapable of consenting, and the law implied force;" in support of which propositions authorities were cited. And it was further held, that where the sexual intercourse was had with the consent of the woman, "although that consent was procured by fraudulent personation of her husband, there was neither actual nor constructive force, and such act does not amount to the crime of rape."

It is not easy to conceive of a case in which an act of this sort could be more properly said to have been accomplished by "surprise."

Yet it was decided, as we have seen, that it would not amount to a rape, and further, that if unsuccessful, the offender would not be guilty of an attempt to commit rape, if he did not intend to overpower the woman by force, if necessary. (This decision led to enactments to meet such a case.)

The offender, in the case before us, was a youth fourteen and one-half years old, and the female was a girl of about the same age. She was in bed in the same room in which three or four of her sisters were also sleeping. Defendant, through a window

We are not
now the char-
rried sheep
damage com-
ischief, it is
chief before,
sued for an
or the same

indictment
econd count
government
efendant on
an one day,
e admissible
e had on the
offense was

that the pris-
than those
etent, upon
y might be
action. But
her distinct
ng an infer-
h which he

is free from
all testified
was forming
n some one
astful desire
gmaid need
ion, and his
deprived her

of Julianne

granted.

that was nailed up, broke into and entered the room, about two hours after midnight. Being aroused by his jarring against her bed, and her foot being brought into contact with his naked person, she screamed and alarmed the household, and he escaped through the window. The indictment against him was for breaking into and entering a dwelling house with intent to commit rape, and (in a separate count) with intent to commit a felony. The breaking into and entering were clearly proved, and the court charged the jury, among other things, that if this was done "with the intent upon his part to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged" in the count alleging the intent to commit a rape.

According to the reasoning in *Lewis v. The State*, it cannot be maintained that this charge was correct. It plainly implies that the crime of rape may be committed without force, either actual or constructive; whereas, not only has it always been held that there must be force, but the short forms of indictment, in which nothing is contained that was not held to be essential, prescribed by the code of this state for that crime, and the assault with intent to commit it, expressly use the word *forcibly*, as necessary in describing those offenses: R. C., 808, 809, forms Nos. 7 and 15.

The very question presented by this record has been decided in other states, in cases of greater aggravation, and in which the parties accused were negroes, and the females white persons. In *Charles v. The State* (6 Eng. Ark., 389), the testimony of the principal witness, a Miss Combs, was: "That about four o'clock in the morning, as she was lying asleep with four other little girls, she was awoke by some one who took hold of her by the shoulders, and tried to turn her over; that she was lying with her face toward the other girls; that he made an effort to get over her; that she threw out her hand, and discovered the person to be a man and partly undressed; that she then raised the alarm, and called for help," etc.

The judge who delivered the opinion of the court, says: "In the case of *Rea v. Williams* (32 Eng. Com. L. R., 524), it was held that in order to find a prisoner guilty of an assault with intent to commit a rape, the jury must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passion upon her person, but that he intended to do so at all

events, and notwithstanding any resistance on her part. In the case of *Com. v. Fields*, a free negro (4 Leigh, 648), which was an indictment for an attempt to ravish a white woman, the jury found a special verdict—that the prisoner did not intend to have carnal knowledge of the female as charged in the indictment, by force, but that he intended to have such carnal knowledge of her when she was asleep, and made the attempt,” etc., “but used no force except such as was incident to getting in bed with her, and stripping up her night-garment in which she was sleeping, which caused her to awake. Upon that state of facts the general court of Virginia was of opinion that he ought to have been acquitted.” And upon these authorities the Supreme Court of Arkansas held that the negro Charles could not, upon the facts in the case before them, be found guilty of an assault with intent to commit rape.

The same court, in a subsequent case (*Pleasant v. The State*, 13 Ark., 360), of a very aggravated assault by a slave upon a white woman, referring to the case of *Charles v. The State*, *supra*, and commenting on the nature of the crime, say: “The better authority would seem to be, that if the man accomplish his purpose by fraud, as where the woman supposed he is her husband, or obtained possession of her person *by surprise, without intending to use force*, it is not rape, because one of the essential ingredients of this offense is wanting. So, where force is used, but the assailant desists upon resistance being made by the woman, and not because of an interruption, it cannot be said that it was his intention to commit rape.”

The charge of the court in the case now before us, was not in consonance with the almost uniform current of decisions in respect to the using or purpose to use force by the accused, in accomplishing the gratification of his passion in such a case, and was, therefore, erroneous.

The judgment is reversed, and the cause remanded, but the prisoner must remain in custody until discharged by due course of law.

NOTE.—All the authorities are agreed upon the general principle that force is an indispensable element in the crime of rape. It is stated by Wharton (2 Whart. Cr. Law, sec. 1144, 7th ed.) that there is some authority for the doctrine that fraud or surprise may supply the place of force, but an examination of the cases referred to will show that in this particular that learned author has fallen into an error. In *State v. Shepard*, 7 Conn., 54, the

prisoner was convicted of an attempt to commit rape, where it appeared that he got into bed with a married woman while she was asleep, and had connection with her, but it is stated in the case that she did not awake or discover the fact until the act had been consummated, and it does not appear upon what theory the case was given to the jury. In a similar case, *Reg. v. Mayers*, 12 Cox Cr., 311 (S. C., 1 Green. Cr., 317), the jury were instructed that "if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her, or attempts to do so while in that state, he is guilty of rape in the one case and the attempt in the other." This case proceeds upon the ground that being unconscious and incapable of assent, the law presumes the act to be against her will. But in *Com. v. Fields*, 4 Deigh (Va.), 648, it was held that if the prisoner simply intended to have connection with the prosecutrix while she was asleep the act would not be rape. Where a woman is violated while unconscious, whether from sleep, from liquor or the effect of drugs, or from any cause, the act amounts to rape. It was so held in *Com. v. Burke*, 105 Mass., 376, where the defendant had connection with the prosecutrix while she was utterly senseless and incapable of consenting from liquor. To the same effect is *Reg. v. Camplin*, 1 Cox Cr., 220. It is held that if the woman is idiotic to that degree that she has no will at all, the act is rape, although she makes no resistance: *Reg. v. Ryan*, 2 Cox Cr., 115. But even in such a case, it seems that if the woman yields, or assents, from a mere animal instinct, no rape is committed: *Reg. v. Barrett*, 12 Cox Cr., 498 (S. C., 1 Green. Cr., 314); *Cornwell v. People*, 13 Mich., 427. The doctrine is well settled that where the act of sexual intercourse is consented to, the crime of rape is not committed, even if such consent is the result of surprise or fraud: *Reg. v. Barrow*, 11 Cox Cr., 191; a case where the woman supposed the prisoner was her husband until the act had been consummated, and, therefore, assented. *Don Moran v. People*, 35 Mich., 356, a case where the girl was led to consent under a pretense that the act was necessary medical treatment.

BROWN V. PEOPLE.

(36 Mich., 203.)

RAPE: Force—Assent—Erroneous charge—Details of complaint.

On a trial for rape, the admission in evidence of the statement of the sister of the prosecutrix, that the latter made complaint to her the next morning that the prisoner on trial and another person named forced her in her chamber the evening before, is held not error.

Where on a trial for rape the act of intercourse is admitted, and the vital question is whether it was by force and against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act; and, considering the place, time, occasion and surrounding circumstances disclosed by this case, it was important the jury should scrutinize the facts bearing on this point very closely.

A charge to the jury in a rape case, that if they should find respondent used force, and complainant resisted so far as she was able to under the circumstances, they should find him guilty, even though they found she at last yielded, is held erroneous and misleading; the term "circumstances," as here used, may have been understood as including weakness of the will; and the term "yielded" as meaning an assent to the consummation or completion of the act; and, if there was a yielding in that sense, there was no case to support a verdict of guilty.

The evidence on the part of the people being that the prosecutrix never yielded, and that on the part of the accused that she made no resistance, but assented from the beginning, there was no basis for a charge on the hypothesis of her having first made resistance but afterwards yielded.

Error to St. Joseph circuit.

O. J. Fast, S. C. Coffinberry and J. B. Shipman, for plaintiff in error.

Otto Kirchner, attorney-general, for the people.

GRAVES, J. Plaintiff in error was lately convicted of the crime of rape, charged to have been committed in the evening of June 29, 1876, on Mary Jane Miller, who was between seventeen and eighteen years of age. She had been residing with her parents near Burr Oak, but some ten days or a fortnight before this occurrence had been taken into the family of Mr. Henry W. Laird to do housework for wages.

A married sister, Mrs. Baker, resided within about half a mile.

At the time in question Mr. Laird's family embraced several young men engaged as farm hands, and among them were his two sons, the plaintiff in-error, and two others.

The prosecutrix alleged that on the evening mentioned she went to her bed-room upstairs, fastened the door, retired to bed and soon fell asleep, but awoke in a short time and found plaintiff in error in bed with her, and that he then and there outraged her.

The details of her relation need not be repeated here. She further alleged that plaintiff in error after consummating the act left, and that in a very short time Gilbert Laird also entered the room and forcibly violated her person; that she made no attempt to leave the room and made no outcry; that she went to her sister's, Mrs. Baker's, the next morning and made complaint.

The plaintiff in error and Gilbert Laird respectively admitted the acts of intercourse, but claimed they were with her assent or acquiescence.

The case depended upon whether she was forced or not. There was no other question in dispute. An objection is made that the court allowed Mrs. Baker to relate the particulars detailed to her by the prosecutrix when complaining to her the next morning. In view of the shape assumed by the case and the character of the testimony of Mrs. Baker, of which complaint is made, I think the objection hardly tenable.

As reported in the record, Mrs. Baker barely testified that the prosecutrix claimed that the plaintiff in error and Gilbert Laird forced her the evening before in her chamber. It may be that a statement of this kind might not be proper in some cases, but I am not prepared to say it was error to admit it here.

There is no occasion to dwell upon it: *Burt v. The State*, 23 Ohio St., 394.

As already observed, the vital question for the jury was, whether the admitted act of intercourse was by force and against the will of the prosecutrix, or whether, on the other hand, it was by her will and consent. The jury were required to be satisfied beyond a reasonable doubt that there was no consent by the prosecutrix during any part of the act, before they could find the plaintiff in error guilty. And, considering the place, the time, occasion and the other circumstances disclosed by the record, it was very important that the jury should scrutinize the facts bearing on this point very closely: *Com. v. McDonald*, 110 Mass., 405; *State v. Burgdorf*, 53 Mo., 65; *People v. Brown*, 47 Cal., 447.

The circuit judge gave several instructions on this part of the case, and most of which were unobjectionable. One, however, in view of the facts, was improper and misleading. It was in these terms: "If you find that respondent used force, and that the complaining witness resisted so far as she was able to under the circumstances, you should find him guilty, even if you should find that the complaining witness at last yielded."

In the first place, this charge is not clear. What was intended to be included in the term "circumstances," as something to prescribe limits to resistance or excuse further resistance, is not very certain. The jury may have taken the expression as including weakness of the will.

Again, the term "yielded," as here used, is not free from ambiguity. The jury may have regarded it as meaning an assent to the consummation or completion of the act. And, if there

was a yielding in that sense, there was no case to support a verdict of guilty.

A further objection to this instruction is, that there was no evidence which fairly authorized it. The evidence on the part of the people was that the prosecutrix never yielded, and that given by the plaintiff in error was that she made no resistance, but, on the contrary, assented from the beginning. There was hence no basis in the evidence for the hypothesis contained in this charge.

Some other points are suggested, but they are not important. For the error in the charge, the judgment must be reversed and a new trial ordered. An order will be entered also for the surrender of the defendant to the sheriff of the county of St. Joseph, in order to allow such further proceedings as may be necessary.

The other justices concurred.

GOSHA v. STATE.

(56 Geo., 36.)

RAPE: Consent of child under ten—Venue must be proven.

The law conclusively presumes that a female child under ten years of age cannot and does not consent to an act of carnal intercourse, and it is not error to so instruct the jury.

The venue must be proven as laid. Where the only evidence was that the act occurred within fifty yards of a house in Sumter county, the evidence was held insufficient, as the house might have been within twenty yards of the county line.

In this case the court gives effect to a technical objection more readily, because of the undue severity of the sentence imposed.

JACKSON, J. The defendant was indicted and found guilty of rape. He moved for a new trial, and error is assigned here on two grounds: first, that the court erred in charging that a female child under ten years of age could not consent to sexual intercourse, so as to show that the act was not done forcibly or against her will, there being some proof of her consent; and, secondly, because the venue was not sufficiently proven; and these are the two questions the record before us makes.

1. As to the first question, the rule at common law is well

established, and, we think, founded in wisdom. See 4 Blackstone (Cooley), 210, 212.

It has also, in effect, received the sanction of this court: *Stephens v. The State*, 11 Georgia Reports, 238. We shall not disturb it.

That rule is that her tender years concludes the question—she cannot consent.

2. In respect to the second point, we think that it does not appear affirmatively, with sufficient certainty, that the crime was committed in the county of Sumter. There is no positive proof in the record of the precise *locus*—the place where it occurred. It was within fifty yards of a residence, and that residence was within the county of Sumter; but there is no proof whether on the line, or near the line, or in the center, or in what part of the county that residence was. It might have been within twenty yards of the line. We are constrained, therefore, to grant a new trial in this case on this ground, and do so the more readily because we think that the court below was rather severe in the penalty inflicted, twenty years in the penitentiary. The defendant was only some sixteen years old; the girl probably did consent; and, while the law renders that no justification as she was under ten, yet, perhaps, it should so mitigate the crime as to make the punishment lighter. At all events, we give him another opportunity of being heard before the jury, and of appeal to the tender mercies of the court below. The parties all belong to the colored population of our state, who, owing to their ignorance, as a general rule, should have justice administered to them tempered with much mercy.

Judgment reversed.

PEOPLE V. ARDAGA.

(51 Cal., 371.)

RAPE: *Evidence.*

A person charged with rape cannot be convicted on the uncorroborated evidence of the prosecutrix, who admits that she is unchaste, and who charges the defendant with having taken her from her room in the night, where another person was sleeping, and with having taken her two miles on horseback, where he committed the crime, and with having then carried her back to her room.

Appeal from the county court, county of Los Angeles.

The indictment charged Ismail Romero, Crecencio Montez, and the defendants, with the crime of rape committed on the person of Delfina Leiva, on the 22d of November, 1875, in the county of Los Angeles. The prosecutrix, Delfina, was the only witness called for the people. She testified that she went from Los Angeles to Wilmington on a pleasure trip, and stopped at the house of Mannela Ruelina, and that she slept with her child, and that another bed in the same room was occupied by Frank Silver; that about twelve o'clock at night, while she was asleep, three men broke into the room and took her from the bed; that she did not awake until they had carried her to the door, when she screamed; that one of the men held a pistol pointed at her head, and threatened to kill her if she did not keep still; that they put her on horseback, and carried her in her night-clothes two miles, when the four men each had intercourse with her by force; and that they then carried her back to the room.

She admitted that she was living with Frank Silver, and that she had been living with him three years, but claimed that she had been true to him since she had lived with him.

She also admitted that four persons besides herself and Silver were sleeping in the house, and that she could not say she was virtuous. She further testified that the defendants were two of the four men. The two not on trial had not been arrested.

The defendants were convicted, and appealed from the judgment and from an order denying a new trial.

Stanford & Ramirez, and *Kewen & White*, for the appellants.

Jo Hamilton, attorney-general, for the people.

BY THE COURT. The defendants were convicted of rape on the uncorroborated evidence of the prosecutrix, who admitted herself to be an unchaste woman.

Her story is so grossly improbable on the face of it, as to render the inference irresistible that the jury must have been under the influence of passion or prejudice. In *People v. Benson*, 6 Cal., 221, the defendant was convicted of rape on the uncorroborated but positive testimony of the woman alleged to have been outraged; and, in reversing the judgment and ordering a new trial, this court said that the story of the woman was "so improbable of itself as to warrant us in the belief that the ver-

dict was more the result of prejudice or popular excitement than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully. * * *

A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials." In *People v. Hamilton*, 46 Cal., 540, which was a similar case, we arrived at the same conclusion, and reversed the judgment, observing that "the ends of justice demand that the cause shall be tried anew." We are of the same opinion in the present case.

Judgment and order reversed, and cause remanded for a new trial.

BOWERS V. STATE.

(29 Ohio St., 542.)

SEDUCTION: *Reputation—Specific acts of lewdness—Privileged communications.*

Under the Ohio statute against seduction of "any female of good repute for chastity, under the age of eighteen years," specific acts of lewdness and misconduct on the part of the prosecutrix with others than the respondent prior to the alleged seduction are not admissible in evidence. Only proof of reputation is admissible.

The Ohio statute against seduction extends to all females under the age of eighteen years whose reputation for chastity is good, whether that reputation is deserved or not.

A communication made by the prosecutrix to her attorney, in a consultation with regard to a bastardy proceeding which she had instituted, is privileged, and cannot be given in evidence.

This was an indictment for seduction. The respondent offered to prove specific acts of lewdness with others prior to the alleged seduction. The evidence was rejected, and the respondent excepted.

The respondent also gave evidence that, prior to the time of the alleged seduction under promise of marriage, he had had sexual intercourse with the prosecutrix not under promise of marriage, and he asked the court to charge that, if they believed this, he should be acquitted. The court refused so to charge, and the respondent excepted.

He also asked the prosecutrix on cross-examination if she had not admitted, in a consultation with her attorney at which her

mother was present, that there was no promise of marriage. This she denied. Afterwards he offered to prove that she had made this admission, but the court rejected the evidence.

WELCH, C. J. The instruction asked by the defendant and refused by the court, and the rejection of testimony tending to show specific acts of lewdness on the part of the prosecutrix, raise the same question, namely, whether the protection of the statute extends to all females under the age of eighteen whose reputation for chastity is good, or only to such as have deservedly acquired that reputation by a pure life. It seems to us that the plain words of the statute leave no room for doubt on this question. The statute provides, "that any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of eighteen years, shall be deemed guilty of seduction." Language could hardly be plainer. It is the reputation and the age of the female, and not her previous conduct, that bring her within the protection of the statute. The law wisely and justly accords to the erring female a *locus penitentiae*. If she has repented of her past error, and by her upright walk acquired an unimpeachable reputation for chastity, the law protects her against the man who overcomes her good resolves by a promise of marriage. It is the purity and integrity of her mind, and not merely those of her person, that the law designs to guard against the attacks of the seducer; and it looks alone to her general repute as evidence of that purity and integrity. We think, therefore, that the court was right in excluding evidence of specific acts of intercourse by the prosecutrix with persons other than the defendant.

Evidence of the defendant's previous connection with her stands on a different basis. Such evidence was properly admitted, not, however, for the purpose of impeaching her character, but because it tends to show that the criminal act charged was not committed under a promise of marriage. We are supported in this view of the case by decisions in several of the states, under similar or analogous statutes. We refer to 11 Ind., 466; 13 *Id.*, 46; 20 *Id.*, 44; 21 *Id.*, 15; 25 *Id.*, 90; 29 *Id.*, 267; 26 N. Y., 203.

The remaining question is, whether the court erred in refusing to receive evidence of the alleged admission of the prosecutrix,

made in consultation with her attorney. We think not. She was a mere witness and not a party, and, as such witness, was compelled to testify. The case, therefore, comes clearly within the rule in regard to privileged communications, unless the presence of her mother at the time of her interview excludes it. It is well established that the privilege extends, as well to communications to or through an agent, as to those made directly to the attorney by the client in person, and we think it is only a dictate of decency and propriety to regard the mother in such a case as being present and acting in the character of confidential agent for her daughter. The daughter's youth and supposed modesty would render the presence and participation of her mother appropriate and necessary.

We see no error in the case, and the motion must be overruled.

Motion overruled.

STATE V. HAWES.

(43 Iowa, 181.)

SEDUCTION: *Sufficiency of evidence.*

In this case the court determines, as a matter of law, that the evidence as detailed in the opinion is insufficient to justify a conviction.

SEEVERS, Ch. J. A reversal of the judgment of the court below is sought, for the reason, as claimed, that the verdict is not supported by sufficient evidence. The defendant and the prosecutrix were both unmarried, and the latter at the time of the alleged seduction and for some time previous thereto, made her home at the house of the parents of defendant, but in what capacity does not appear.

The prosecutrix was about twenty-two years old, and the defendant is presumed to have been several years older. If any false promises were made, or seductive arts or influences used amounting to seduction, it will be found in the following portion of the testimony of the prosecutrix:

"When we were returning from meeting defendant said he heard me remark that I never intended to get married, and he wanted me to promise to marry him if anybody. I had a proposal from a widower; defendant wanted me to promise not to

marry him, and I told him I did not intend to marry any way.

* * * There were about three evenings we sat and talked after the family went to bed. In November, 1870, he came to my room door and said he wanted to kiss me; I told him it was no time for him to say anything to me; that it was midnight, and for him to leave my room; I got up and dressed.

* * * He took me home one time from the cars, and on the way said his mother thought I would make as good a companion as Webster Haven's wife. He used to say to me I was the only one he ever met he cared anything for, and he intended some day to get married, and when he did he wanted I should be his wife. February 16th, 1871, my birthday, we had our pictures taken together, he and I and an acquaintance of ours, in one group. * * * On the night of the 7th of July, 1871, he came to my room, and as I woke up he was in bed. He grabbed me as I turned over; I said, 'O, my Lord, Norman, I am a ruined girl.' He said to keep still or I would be hurt. I said, 'O Lord.' He said I ought to know him well enough, that he would not deceive me. He put his hand on my face and kissed me, and said for me to keep quiet. I had intercourse with him that time.

"He was not there but a few moments. I told him to leave; he said he would hardly. * * * He was in bed but a few minutes, about five or ten. I recollect his telling me I need not be uneasy, that he would not forsake me, that I ought to know him. I did not tell him I was not afraid at all; only a few words passed. It was about midnight. When he took hold of me he grabbed me in his arms; I didn't mean that he hurt me. I tried to pull away from him.

"The second time he was in my room about midnight. The night of July 7th he did not promise to marry me; no promise was made, because I never came out and told him I would marry him until I wrote that letter from mother's. I told him at first I didn't intend to marry anybody; afterwards I told him I never should marry any one but him; since this happened, but not before, I told him I would marry him."

It is perfectly natural, and to be expected, that the prosecutrix should, as far as possible, shield herself and cast the blame, if any there was, on the defendant. There should not, therefore, be any strained construction put on her language, in order to sustain the verdict. On the contrary, as the defendant is entitled

to the benefit of all reasonable doubts there may be as to his guilt, the language of the witness should receive no other construction than its fair and natural meaning may entitle it to. The material inquiry is, was there a promise of marriage existing between the prosecutrix and the defendant, or did the latter use any arts, false promises or seductive influences, whereby or by reason whereof the prosecutrix was induced to yield herself to the embraces of the defendant?

We think the fair and reasonable construction of the evidence is there was not. To make such out, a strained or unnatural construction must be placed on the language of the witness. This the jury were not warranted in doing in order to convict. The verdict is not, therefore, supported by sufficient evidence.

Reversed.

WILKINSON V. STATE.

(59 Ind., 416.)

SUNDAY LAW: *Works of necessity.*

The necessity which excuses and justifies common labor on Sunday need not be a physical or absolute necessity. If the labor is necessary, under the circumstances of any particular case, to be performed on Sunday, in order to accomplish any lawful purpose, it is not prohibited by the statute.

A fruit-grower may lawfully pick his fruit on Sunday, and haul it on the way to a Monday's market, if without such labor on Sunday his crop would be lost to him by spoiling before he could get it to a market.

The defendant, being on trial for a violation of the Sunday law, proved that he had before been convicted on his plea of guilty before a justice of the peace, and fined one dollar, for the identical offense then on trial. *Held*, that this was a complete bar to the pending prosecution.

Howk, J. The appellant was indicted at the August term, 1877, of the court below.

The indictment charged that, on the 29th day of July, 1877, at Gibson county, Indiana, the appellant, who was at that time over fourteen years of age, said day being the first day of the week, commonly called Sunday, was found unlawfully at common labor and engaged in his usual avocation, to wit, then and there loading and hauling melons, such common labor and usual avocation not being then and there work of charity or necessity,

and the appellant not being then and there one who conscientiously observed the seventh day of the week as the Sabbath, nor a traveler, a family removing, a keeper of a toll-bridge or a toll-gate, or a ferryman, acting as such; contrary to the form of the statute, etc.

Afterward, at the January term, 1878, of the court below, the appellant appeared, and, for plea to said indictment, said he was not guilty; and the issues joined were tried by a jury, and a verdict was returned, finding the appellant guilty as charged in the indictment, and assessing his fine in the sum of one dollar and fifty cents.

The appellant's written motion for a new trial was overruled by the court, and his exception to this decision was duly reserved, and judgment was then rendered on the verdict, from which judgment this appeal is now here prosecuted.

The only error assigned by the appellant, in this court, is the decision of the court below in overruling his motion for a new trial. In this motion, the causes assigned for such new trial were that the verdict of the jury was contrary to law, and that it was not sustained by sufficient evidence.

It will be seen that the question for our decision in this cause is this: Were the verdict of the jury, and the judgment of the court below thereon, sustained by sufficient legal evidence? The evidence on the trial is properly in the record; and we find it necessary to the proper understanding of this cause, and of our decision thereof, that we should set out the substance of the evidence in this opinion.

But, before doing so, we will first give the section of the statute under which the indictment was found against the appellant. The section referred to is the first section of an act entitled "An act for the protection of the Sabbath, and providing penalties for the desecration thereof," approved February 28th, 1855. Omitting the enacting clause, this first section reads as follows: "That if any person, of the age of fourteen years and upwards, shall be found on the first day of the week, commonly called Sunday, rioting, hunting, fishing quarreling, at common labor, or engaged in their usual avocations, works of charity and necessity only excepted, such person shall be fined in any sum not less than one nor more than ten dollars; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers, families

removing, keepers of toll-bridges and toll-gates, and ferrymen, acting as such :” 2 R. S. 1876, p. 483.

We will now give the evidence as it is contained in the record :

William Kimball, a witness for the state, testified as follows : “ My name is William Kimball. I live in Gibson county, Indiana. I know the defendant, Silas Wilkinson ; that is him (pointing to the defendant). Have known him for several years. On the 12th day of August, 1877, I saw the defendant hauling watermelons ; that day was Sunday ; he was hauling a wagon-load with two horses ; it was some time in the afternoon of that day that I saw him ; he was going in the direction of Evansville, Indiana. It was in Gibson county, State of Indiana, that I saw defendant hauling watermelons on that day ; he had about one hundred watermelons in the wagon.”

On cross-examination this witness testified : “ The defendant, Wilkinson, resides upon a farm about twenty-five or twenty-six miles from Evansville ; his melon patch was on his farm.”

The state then rested.

William H. Overton, a witness for appellant, testified as follows : “ My name is William H. Overton. I reside in Gibson county, Indiana ; have lived here continuously for fifteen or sixteen years. Am a farmer. I have had a great deal of experience raising watermelons ; I have raised them for several years. I know the defendant, Silas Wilkinson ; have known him for a long time ; he raised a patch of melons last season, the summer of 1877 ; he had four or five acres in the patch. On the 12th day of August, 1877, I was in his melon patch. It was on his farm, near the house in which he lives ; at that time there were between five and six hundred melons in that patch, on that day, that had spoiled ; they had grown too ripe and had begun to decay. There were as many more just right to be plucked from the vine. Watermelons will not last but a short time after getting ripe ; they ought to be used at once. It depends upon the weather largely how long they will last. I have known thousands destroyed in from twelve to twenty-four hours after they first got ripe.”

On cross-examination this witness testified : “ Nearly every one who raises melons loses more or less of them. There are a great many raised in the neighborhood where Wilkinson lives. The reason they lose them is because watermelons get ripe all at

once, and it is next to an impossibility to get them all to market."

The appellant, as a witness in his own behalf, testified as follows: "My name is Silas Wilkinson. I reside in Gibson county, Indiana; have lived in this county continuously for the past twenty-five years. Am a farmer; am the defendant in this suit. In the summer of 1877, I raised a patch of watermelons on my farm in this county. I had only the one patch in the summer or during the year of 1877. On Sunday, the 12th day of August, 1877, I started with a two-horse wagon-load of watermelons taken from my patch, for Evansville, Indiana. Evansville is twenty-six miles from my farm. Evansville was my market for my melons at that time. On that Sunday there were at least five or six hundred melons in my patch dead ripe and ready for the market. There were at least as many more then spoiled for the want of being plucked from the vines and taken to market. The 12th of August, 1877, was right in the middle of the melon season, and they would get ripe faster than I could haul them to market. I could only haul about one hundred melons at a load. I had to haul them twenty-six miles. I had only one team of my own. Joel Grigsby had helped me all the week before until Friday before this Sunday, when he was taken sick. I tried to get other help and could not. I hauled all the week before, and all the week beginning on August 12th, 1877. I saved the load of melons I started with on that Sunday. I lost at least two thousand melons that season because I was unable to get them to market."

On cross-examination the appellant testified: "I loaded up my melons on Saturday night before the Sunday, August 12th, 1877. I started for Evansville early in the afternoon of that Sunday. I did not start in the morning because there were relatives visiting my family, and because I could reach the Monday morning market at Evansville by waiting until the afternoon. I could, perhaps, have left home at midnight on Sunday night, and reached Evansville by the time I left there on Monday morning. I did not do it because my team would have been exhausted, and I would have lost time on Monday. I went within two miles of Evansville on Sunday. Early Monday morning, with a fresh team, I drove to Evansville, disposed of my melons, and I started at once, by nine o'clock A. M., for home. I reached home in time to load up another load for

Tuesday's market. I did not start with another load until Tuesday morning early. I might have started at midnight, Sunday night, reached Evansville by the time I started home on that Monday, disposed of my melons, and returned immediately home, but the effort would have exhausted my team. I could have started at or after twelve o'clock on the night after the Sunday in question, and got to Evansville about nine o'clock on the Monday morning following, rested my horses and started home in the afternoon on the said Monday, and got home in time to load up again and be ready to start again on the Tuesday following, by the time I did start on said Tuesday, but it would have made me late in the evening on Monday loading up. I could not make a load each day, but only a load every other day. I was before John Martin, a justice of the peace, to answer to the same charge for which I am now being tried. I then plead guilty, and was fined one dollar. It was some time in September, 1877."

Joel Grigsby, a witness for the appellant, testified as follows: "My name is Joel Grigsby. I live in Gibson county, Indiana; have lived here for fifteen years; am a farmer. I know the defendant, Silas Wilkinson; have known him for several years. I have raised watermelons for several years. I was in defendant's watermelon patch on the Friday before August 12th, 1877. I had been hauling melons to Evansville all that week, out of that patch for Wilkinson. I could only haul a load every two days. I would go down one day and back the next. I quit hauling on Friday because I was not well. There were a great many melons then in the patch that were spoiling for the want of being plucked from the vines and used. I should say there were five hundred that ought to have been taken that day to market, besides a number that were already spoiled because they had not been taken sooner."

This was all the evidence on the trial of this cause, as the same appears in the record. Under this evidence the question arises, and this is the main question in this case, was there a "necessity," within the meaning of that word as the same is used in the statute before cited, that the appellant should perform the common labor charged in the indictment, on the first day of the week, commonly called Sunday? It is well settled, we think, that by the word "necessity," as used in the statute, is not meant that the necessity for the work on which the charge

is predicated should be a physical or absolute necessity. Such labor, on Sunday, as may be necessary to the accomplishment of a lawful purpose, under the circumstances of any particular case, cannot be considered as within the purview and prohibition of the statute for the protection of the Sabbath.

In the case of *Morris v. The State*, 31 Ind., 189, where the appellant had been engaged in hauling and boiling sugar-water, on a certain Sunday, and it appeared that it was a good day for the flowing of the water, that the appellant's troughs were full and overflowing, and that he had no way to save the water but by gathering and boiling it, it was held by this court that his labor was a work of necessity, within the meaning of the term as used in the statute.

So, also, in the case of *Crocket v. The State*, 33 Ind., 416, it was held that such labor, on Sunday, as was a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, was a work of necessity, within the meaning of those words, as the same are used in the law for the protection of the Sabbath.

The two cases cited from our own reports are well supported by the decisions of the courts of other states, on statutes similar to the statute of this state. These decisions are cited as authorities in our own cases before noticed, and we refer to them there without again citing them.

It is difficult, if not impossible, to distinguish the case at bar, in principle, from the case of *Morris v. The State*, before referred to. The melon season, like the sugar-making season, is of but short duration, "depending on the season and the weather." In this case it would seem that a kind Providence had crowned the labors of the appellant with a bounteous harvest of melons. They were ripening and decaying much faster than, with the facilities and labor at his command, he could possibly get them to market. His melon patch was twenty-six miles from his market. He could only haul a load to market every two days, and a load was one hundred melons. He could not hire any assistance. On Sunday, August 12th, 1877, the day mentioned in the evidence, there were at least five or six hundred melons in his patch, "dead ripe and ready for the market." A ripe watermelon in its season is a luxury, but there is nothing more "stale, flat and unprofitable" than a decayed or rotten melon. Under the circumstances, what was the appellant

to do? It seems to us that it was his duty, as a prudent and careful husbandman, to labor diligently in getting as many of his melons as he could into market, so that the fruits of his toil might not be wasted or suffered to decay. Whatever it was his duty to do in the premises there was a moral necessity for him to do. And, in the accomplishment of the main purpose of saving and securing the benefit of his crop of melons, whatever labor he was reasonably required to do on Sunday, must be regarded, as it seems to us, as a work of necessity.

Under the circumstances shown by the evidence in this case, it seems to us that the labor in which the appellant was engaged on Sunday, August 12th, 1877, and for which he was indicted, was a necessary incident to the accomplishment of a lawful purpose, namely, the saving and getting into market his crop of melons, and was, therefore, a work of necessity, within the meaning of that expression as the same is used in the statute for the protection of the Sabbath. Nor do we think that the fact that, by getting up at midnight on Sunday night and driving all the remainder of the night, he could have reached Evansville in time for the Monday morning market, made his labor on Sunday afternoon any the less a work of necessity. It is not necessary to the protection of the Sabbath that men should abuse or overwork either themselves or their horses by midnight labor; and, in our opinion, it is no desecration of the Sabbath to garner and secure on that day the fruits of the earth, which would otherwise decay and be wasted.

On one other ground, it seems to us, the conviction of the appellant in this case was clearly wrong.

By section ninety-seven of the Criminal Code it is provided that, under the general issue, "every matter of defense may be proved:" 2 R. S. 1876, p. 398. Under this provision it has been held, that a former conviction for the same offense might be proved in bar of the pending prosecution: *Lee v. The State*, 42 Ind., 152. In the second section of the act for the protection of the Sabbath, etc., before referred to, it is provided that, in all cases under said act, justices of the peace and courts of common pleas (now circuit courts) shall have concurrent jurisdiction. Of course, the record is the best evidence of such former conviction; but, if neither party objects, it may be proved by oral evidence. As we have seen, it was proved, on the trial of this case, by the appellant's own evidence, without objection by the

state, that he was tried by John Martin, a justice of the peace, on "the same charge" for which he was then on trial, and that he then plead guilty and was fined one dollar. It seems to us that this former conviction was a complete bar to this prosecution.

In our opinion, the court below erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause is remanded for a new trial.

STATE v. STEWART.

(Iowa. Opinion filed Oct. 28, 1879.)

ABORTION: *Reasonable doubt.*

In a criminal case every material fact must be proved beyond a reasonable doubt; and, therefore, an instruction in an abortion case, that if the fact of the pregnancy and the time and place of the alleged crime are fully and clearly proven, and it is proved beyond a reasonable doubt that the defendant administered drugs or introduced instruments with intent to produce a miscarriage, he should be convicted, is erroneous.

An instruction from which the jury may infer that a doubt is not a reasonable doubt unless it is shared by all the members of the jury, and that unless such a doubt exists the defendant should be convicted, is erroneous. Such a doubt must exist before there can be an acquittal (*State v. Rodabaugh*, 19 Iowa, 154), but there ought not to be a conviction so long as one or more of the jurors entertain a reasonable doubt of the defendant's guilt.

Appeal from Harrison district court.

The indictment charged that the defendant "did unlawfully, willfully and feloniously administer to one Surrilda Purcell, who was then and there a pregnant woman, certain drugs and substances, and did then and there unlawfully * * * use a certain instrument * * * with intent then and there and thereby to produce the miscarriage of the said Surrilda Purcell, such miscarriage * * * not being necessary to save her life." There was a verdict of guilty, judgment, and defendant appeals.

Cochran & Bailey, for appellant.

J. F. McJunkin, for the state.

SEEVERS, J. 1. The second and third instructions given the jury were as follows:

"2. There are in the offense, with which the defendant is charged as enumerated in the indictment herein, the following material allegations, to wit: *First.* That on or about the first day of November, 1878, said Surrilda was pregnant. *Second.* That the defendant, Stewart, willfully administered to said Surrilda Purcell some drugs, or drugs or substances, with the intent to produce the miscarriage of said Surrilda Purcell, or that he used some instrument upon said Surrilda with the intent to produce her miscarriage. *Third.* That this was done by defendant at and within this county and state, and on or about the first day of November, 1878, and while said Surrilda was pregnant.

"If the first and third of the foregoing material allegations are fully and clearly proven, and either the first or second averment of the second allegation is proven beyond all reasonable doubt, and you are further satisfied, beyond all reasonable doubt, of the guilt of the defendant, your verdict should be guilty. If not so satisfied, then your verdict should be not guilty.

"3. A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury, after fully and carefully weighing and considering all the evidence which has been introduced herein during the progress of the trial, when viewed in the light of all the facts and circumstances surrounding the same."

It is insisted these instructions are erroneous, and in relation thereto we have to say (1), in order to constitute the crime charged, Surrilda Purcell must have been pregnant at the time the drugs were administered or instrument used with intent to produce the miscarriage. Unless the fact of pregnancy was established beyond a reasonable doubt, the defendant was entitled to an acquittal. But it does not follow that the jury should be instructed to this effect. It is sufficient if the jury are instructed they should acquit if, upon the whole case, they have such a doubt. When such an instruction is given it covers the whole ground, and necessarily includes such material fact required to convict, and sufficiently directs the jury that each material fact must be established beyond a reasonable doubt: *The State v. Felter*, 32 Iowa, 53; *The State v. Hayden*, 45 Iowa, 17. If we understand the second instruction, the jury are told that it is sufficient if the existence of pregnancy has been "fully and clearly proven." This is not equivalent to saying it must be established beyond a reasonable doubt. A clear, well-defined, and, we doubt not, intentional distinction is drawn

between pregnancy and the administration of the drugs or use of the instrument. It must be presumed the jury understood the distinction thus drawn, and that the fact of pregnancy was only required to be fully and clearly proven, while the use of the instrument or administration of drugs must be established beyond a reasonable doubt. This, we think, constitutes error to the prejudice of the defendant, and that it is not cured by the subsequent remark that if the jury "are satisfied, beyond a reasonable doubt, of the guilt of the defendant," they should so find; for the jury are not told if they have such doubt on the whole case they must acquit. Besides this, the latter part of the instruction is contradictory to that portion which indicates the degree of proof required to establish the fact of pregnancy. But we ground our opinion principally upon the proposition that the instruction draws a distinction between two facts, both of which should be established beyond a reasonable doubt, before the defendant could be convicted.

2. The definition of reasonable doubt, in the third instruction, is "such as arises in the minds of the whole jury." If by this it was meant that there must be such doubt before there could be an acquittal, it is correct: *The State v. Rodabach*, 19 Iowa, 154. But the difficulty is, whether the jury did not understand that if such doubt did not exist there should be a conviction. If this latter view is the correct one, then the instruction is erroneous, because it amounts to a direction to each individual juror to yield his convictions, unless the reasonable doubt entertained by him is shared by his fellows. While we have some doubt as to the proper construction of the instruction, we, on the whole, incline to think it was prejudicial to the defendant, and may have produced a conviction, when one or more of the jurors may have entertained a reasonable doubt of his guilt.

3. In view of a new trial, it is proper to say that none of the objections to the evidence, or the admission thereof, are well taken. The objection made here to the admission of the evidence of the witness Hull, is that it is not rebutting, but the objection below was that it was incompetent. It was clearly competent and material, but it may not have been strictly rebutting.

Reversed.

BAKER V. STATE.

(Wisconsin. Opinion filed Sept. 2, 1879.)

BASTARDY: *Reasonable doubt—Sufficiency of evidence.*

In a bastardy proceeding the paternity of the child must be established beyond a reasonable doubt.

Where it appears, from the testimony of the prosecutrix, that she had sexual intercourse with two different persons so nearly the date of conception that either of them might be the father of the child, a conviction cannot be had, although the prosecutrix swears that conception resulted from the first act. It is impossible that she should know this.

Error to circuit court, Iowa county.

M. M. Strong, for plaintiff in error.

Attorney-General, for defendant in error.

ORTON, J. The judgment in this case must be reversed on the evidence.

The testimony of Ann E. Swagger, the prosecutrix, is positive that her last menstruation was the first of September; that she had sexual intercourse with the defendant about two weeks thereafter, and with one C. Greenlast about two weeks after that; that her child was born the 25th of May, and that the defendant is its father.

In such cases the paternity of the child is the main and material fact to be found by the jury (*Speiger v. The State*, 32 Wis., 400), and this fact the jury must find beyond a reasonable doubt: *Zweigle v. The State*, 27 Wis., 396. Whatever the probabilities may be, from this evidence, that pregnancy resulted from the first act of sexual intercourse, which was with the defendant, because of its being nearest the termination of the period of menstruation, and of the longer time before the birth of the child, yet they are mere probabilities, and, by the best medical authorities, very questionable, and by no means without reasonable doubt: 2 Wharton & Stillé, secs. 43, 44, 45 and 46, and cases cited.

The prosecutrix having had sexual connection with two persons within so short a time, it was impossible for her to testify which act produced pregnancy, and which person is the father of

the child: *Commonwealth v. McCarty*, 2 Penn. L. Rep., 135; 4 Penn. L. Rep., *Commonwealth v. Fritz*, 43.

In view of these undisputed facts, and of the most creditable authorities, the jury could not have found the defendant guilty beyond a reasonable doubt. Physiological speculations, natural probabilities, or merely probable cause, are quite insufficient, upon the trial, to establish the fact of paternity in such a case. There must be, from the very nature of such evidence, great, and certainly very reasonable, doubt as to this main fact. It is urged that if this is to be the rule, a conviction can never be attained when more than one person has had sexual intercourse with the complainant about the same time. This consequence of the rule is far less important and serious than the wrong and injustice of a conviction upon insufficient evidence.

In such a case the question is not whether the defendant is guilty of having had illicit intercourse with the complainant, but whether, by such intercourse, the child was begotten, and this fact must be found beyond a reasonable doubt. This being the true legal rule, the consequence of its strict observance by courts and juries is not to be considered, except in changing or abolishing the rule itself; but while the rule exists the consequences will not be presumed to be wrong or mischievous, but rather right and just.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

TAYLOR, J., dissents.

NOTE. The clear weight of authority is that bastardy is essentially a civil proceeding, and therefore that a preponderance of evidence is sufficient to establish the paternity of the child: *Mann v. People*, 35 Ill., 467; *Allison v. People*, 45 Ill., 37; *Walker v. State*, 6 Blackf., 1; *Richardson v. Burleigh*, 3 Allen, 479. It is quite probable that the Supreme Court of Wisconsin will not adhere to its ruling in this case.

Since it was decided the question arose again but was not decided, the opinion stating that the members of the court were not agreed upon this point: *Dingman v. State*, Wisconsin, opinion filed Feb. 24, 1880.

REGINA v. MOORE.

(18 Cox Cr., 544.)

BIGAMY: *Bona fide belief of death of first husband.*

To an indictment for bigamy it is a good defense that, at the time of the bigamous marriage, the prisoner had a reasonable and *bona fide* belief that her husband was dead, although seven years had not elapsed since she last heard of him.

Emma Louisa Attersall Moore was indicted for that she, on the 14th day of December, 1875, at Thrussington, in the county of Leicester, feloniously did marry one Morris Tonge, her former husband, Robert Moore, then being alive.

Brogden, prosecuted.

Horace Smith, appeared for the prisoner.

It was proved that the prisoner, whose maiden name was Emma Louisa Attersall Thorold, was married under that name to Robert Moore, at St. Pancras church, on May 11th, 1857, and that on the 14th December, 1875, she went through the ceremony of marriage at Thrussington, in Leicestershire, with Morris Tonge. The prisoner had, for nine months previously, been living in Thrussington, as housekeeper to the said Morris Tonge. The bans had been duly published in the names given in the certificate, in which the prisoner was described as Emma Louisa Moore, widow, and the ceremony was performed in the parish at Thrussington.

When before the committing magistrate the prisoner said: "I believed my first husband was dead." At the close of the case Mr. Horace Smith proposed to call evidence to show that the prisoner *bona fide* and reasonably believed that her first husband was dead, citing *R. v. Turner* (9 Cox C. C., 145), and *R. v. Horton* (11 Cox C. C., 670), and pointing out that a decision of Sir Baliol Brett, in *R. v. Gibbons*, to the contrary, is said, in a note to the last edition of Russell on Crimes (5th ed., vol. 3, p. 265), to be inconsistent with the view taken by the same learned judge in his judgment in *R. v. Prince*. (a)

The learned counsel having addressed the jury in this sense, called witnesses who stated that Robert Moore had deserted his wife about four or five years ago, and that since the desertion a sister of the first husband had written to say he was dead, and

that a general belief of his death existed, which belief was shared by Morris Tonge and all who were connected with the parties in the neighborhood. No inquiry was made by the prisoner as to the truth of the statement said to have been made in the letter, and the letter was not produced.

DENMAN, J., in summing up the case to the jury, said: The section of the act of parliament (24 and 25 Viet., c. 57), is perfectly simple until you come to the exception, "provided that nothing in this section contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." Now, this case is not within the exception; but does this general principle apply, that if at the time of contracting a second marriage the prisoner has a *bona fide* and reasonable belief that the first husband or wife, as the case may be, is dead, in such case is the prisoner entitled to an acquittal? Two judges have separately decided that such belief is a good defense (Martin, B., in *R. v. Turner*, 9 Cox C. C., 145, and Cleasby, B., in *R. v. Horton*, 11 Cox C. C., 670), and two judges, after solemnly consulting together, have decided that it is no defense. (Brett, J., and Willes, J., in *R. v. Gibbons*, 12 Cox C. C., 237.) If you think that the prisoner, having a bad husband, without any real belief of his death, took the risk of marrying again, acting upon what she thought she might appeal to as a defense hereafter, then you should find against her. But if you think she believed, and reasonably believed, her first husband to be dead before she married again, then you should say so, and I would consider whether I would reserve a case for the court of crown cases reserved.

The jury found that the prisoner married under a *bona fide* and reasonable belief that her husband, Robert Moore, was dead.

DENMAN, J. I will consider whether a point be reserved.

Friday, March 9. DENMAN, J. I adjourned this case yesterday, in order that I might consult my brother judge (Lord Justice Amphlett), as to the effect of the finding of the jury on the question left to them. The question upon which they gave their opinion was this: They found that the prisoner, at the time when she went through the ceremony of marriage with Morris Tonge, *bona fide* and reasonably believed that her husband was

dead. Owing to the great conflict of decisions of different judges as to whether that finding constitutes a defense in law or not, I thought I ought to take time before stating what course ought to be taken, and to consult my brother judge as to what he thought was right to do. Two very learned judges—one the late Baron, now Sir Samuel, Martin, a judge of long experience, who some time since retired from the bench, and the other, Baron Cleasby—held in two different cases (*R. v. Turner*, 9 Cox C. C., 145; *R. v. Horton*, 11 Cox C. C., 670), that such a finding as this constituted a defense. Two other learned judges—Sir Baliol Brett and the late Mr. Justice Willes—considered another case (*R. v. Gibbons*, 12 Cox C. C., 237), subsequently to the two I have mentioned, and held that when such facts were found by a jury they did not constitute a defense.

Under almost any circumstances, where there was such a conflict of decisions, a judge would, I think, be reluctant to take upon himself to decide the point, and what he would do in the interests of justice, in order that the law might be finally settled, would be to reserve the case for the court of criminal appeal to say whether the finding of the jury did or did not, in the opinion of the court, constitute a defense. If this had been a case in which, supposing the court of criminal appeal had thought the finding of the jury did not constitute a defense, I should have felt it my duty to have passed a substantial punishment—I should have felt bound to adopt that course; but, having consulted my brother judge, and finding that he had on a former occasion very carefully considered this very question, and, so far as his opinion was concerned, it was in favor of this being a valid defense, I must say that, subject to all the diffidence and doubt caused by the strong opinion formed by Sir Baliol Brett and the late Mr. Justice Willes—who did not reserve the point because they felt so strongly that it was no defense—my own opinion goes with my colleague at these assizes, and I think I should hold, after full argument, that the finding of the jury did constitute a defense. I bear in mind the case of *R. v. Prince* (L. Rep., 2 C. C. R., 154; 44 L. J., M. C., 122; S. C., 1 Am. Cr., 1), but in this case the thing done was not unlawful, and, therefore, its legality or illegality entirely depended on the question, whether the prisoner knew she contracted the second marriage during the lifetime of her former husband, and on the principle of common law, that no person should be deemed guilty of an offense unless he

or she knew that it was willfully committed, a great deal might be said in favor of the view, that with such a finding of the jury the prisoner ought not to be deemed guilty. I do not wish to give a final judgment, and if the case had been one which merited a severe punishment, I should have reserved it for the decision of the court of criminal appeal. The case, however, is one which, under any circumstances, after such a finding of the jury, in which I see no reason to disagree, I should only have passed a nominal sentence; and, therefore, as I do not think it fair to the prisoner, in order that a point of law may be settled for the benefit of the country, to put her to the expense of arguing the case before the full court, my own and my colleague's judgment being in favor of the finding of the jury constituting a defense, I shall hold that the finding amounts to a verdict of not guilty, and order the prisoner to be discharged.

Solicitors for the prosecution, *Tweed and Stephens* of Lincoln.
Solicitor for the defense, *Page* of Lincoln.

NOTE. Of the justice of the rule laid down in this case there can be no question. It is a general rule of the criminal law, that where one acts upon a *bona fide* and reasonable belief of a fact, the question of the criminality of his act is to be judged as though the fact existed. In *Com. v. Mush*, 7 Metc. (Mass.), 472, the court held that a *bona fide* belief of the death of the first husband was no defense, and a conviction was had. But in that case the harshness of the rule adopted was so apparent that the defendant was pardoned before any judgment was pronounced, the court accepting a recognition for her appearance after the decision, in order to afford opportunity to obtain and plead the pardon in bar of sentence.

The case, however, of a *bona fide* and reasonable belief of a fact is not to be confounded with a *bona fide* mistake as to the law. If a person marries a second time, supposing that he has a legal right to, but knowing all the facts on which the legality of the marriage depends, his good faith will not avail him: *State v. Goodenow*, 65 Me., 80 (S. C., 1 Am. Cr., 42); *U. S. v. Reynolds*, 1 Utah T., 226 (S. C., 8 Otto, 145); *Davis v. Com.*, 13 Bush., 318 (S. C., ante, p. 163).

It is said that the state must prove, beyond a reasonable doubt, that the first wife was living at the time of the second marriage. Where there is no direct evidence on this point, and the only evidence is that the first wife was alive two years previous to the second marriage, the presumption of the continuance of her life is neutralized by the presumption of the defendant's innocence, and in such a case there can be no conviction: *Equire v. State*, 46 Ind., 459.

COMMONWEALTH V. RICHARDSON.

(126 Mass., 34.)

BIGAMY: *Marriage of a man whose wife had obtained a divorce for his misconduct — Variance.*

Under a statute which provides that a divorced person, "who is the guilty cause of such divorce," shall be deemed guilty of bigamy if he marries again during the lifetime of his divorced wife, such an one cannot be convicted of bigamy under an indictment which merely charges bigamy in the ordinary manner. In such a case the indictment must allege the divorce, and that the defendant was the guilty cause thereof, and all the other facts necessary to bring the case within the terms of the statute.

It is a general rule in criminal pleading, that if an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated, and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance.

LORD, J. The status of a party, whose contract of marriage has been judicially dissolved for his fault, has not, in this commonwealth, been precisely defined. In *Commonwealth v. Putnam*, 1 Pick., 136, Mr. Justice Wilde says: "By the divorce the first marriage was dissolved, and, but for the second section of the act of 1784 (c. 40), the second marriage would have been lawful by our laws," and adds: "Notwithstanding the restraint imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." In *West Cambridge v. Lexington*, 1 Pick., 506, Chief Justice Parker, in giving the opinion of the court, speaks of such party as "not being, in a legal sense, a married man, and, perhaps, not to be considered as having a former wife living, the decree of divorce having terminated the relation of husband and wife." We do not deem it necessary in this case to determine whether any or what marital duties or obligations remain upon such person.

By the General Statutes (c. 165, sec. 4), it is enacted that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall (except in the cases mentioned in the following section) be deemed guilty of polygamy."

The following section is in these words: "The provision of

the preceding section shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remain absent for the space of seven years together, the party marrying again, not knowing the other to be living within that time, nor to any person legally divorced from the bonds of matrimony, and not the guilty cause of such divorce."

This statute is substantially the same as the statute of 1784 (c. 40), and from that time, and for a period long before, to the present, has been in substance the law of the province and the commonwealth.

The same provisions were incorporated into the Revised Statutes, chapter 130.

In *Commonwealth v. Putnam, ubi supra*, the guilty party in the divorce suit married again in another state, and was indicted for the crime of adultery in this state. In *Commonwealth v. Hunt*, 4 Cush., 49, the guilty party married again, also in another state, and the indictment charged her with lewd and lascivious cohabitation in this state, with the party to whom she claimed to be married. In each of these cases the court held that the offense charged was not the offense committed.

In the former case the jury found a special verdict establishing the facts of the former marriage, the divorce for the defendant's adultery, his second marriage in Connecticut, and his cohabitation in this state.

Lincoln, in behalf of the defendant, in argument, is reported as saying: "Johnson defines adultery 'the act of violating the bed of a married person.' The defendant has not done this. He has not violated any plighted faith to his former wife." "The indictment might as well have been for polygamy as for adultery;" "though in truth he could not be indicted for either, unless he were a married man at the time of the second marriage." In declaring the result at which the court arrived, Mr. Justice Wilde utters the dictum: "The defendant should have been indicted on the second section of the act referred to," which is substantially the same as the General Statutes (c. 164, secs. 4, 5).

Although a dictum by that magistrate is always entitled to most respectful consideration, it is not to be regarded as the judgment of the court. The dictum is, however, qualified by the statement, "The second marriage, with all the other facts consti-

tuting the crime of polygamy, should have been set forth in the indictment, so that defendant might have been prepared to answer and defend himself, showing that that learned judge deemed it necessary that the divorce and the subsequent marriage of the guilty party should be alleged in the indictment: 1 Pick., 139. In the latter case, Mr. Justice Dewey speaks more cautiously, and says: "If the facts in this case afforded ground for any indictment under the Revised Statutes, chapter 130, it would be more properly an indictment upon the second section, for unlawfully cohabiting within the state, with Davis, as husband and wife, the defendant having a former husband living, and not coming within the exception of the third section, as a person 'not the guilty cause of the divorce,'" decisively intimating that, if the indictment could be maintained under that statute, it must aver the facts which bring the party within its terms: 4 Cush., 50.

In *Commonwealth v. Lane*, 113 Mass., 458, the question presented in this case did not arise, and was not considered by the court; for, although the defendant was charged with polygamy, under the same statute, for marrying a second time during the life of the former wife, the defense was that his marriage was a legal marriage under the law of the state of New Hampshire, where it was consummated, and the court so held.

These three cases, it is believed, are the only ones which have been decided in this commonwealth, in which the subsequent marriage of the guilty divorced party has been before the court upon an indictment.

It is certain that it has never been decided by this court, that such party can be convicted of polygamy under the provisions of the General Statutes, chapter 165, section four, or the previous statutes of the same character.

Nor do we deem it necessary, for reasons hereafter to be stated, now to decide that question.

If that question could be presented nakedly, it would be a matter deserving of grave consideration, whether the party charged could be said, in criminal pleading, to be one having a husband or wife living, or as being a lawful husband or wife, but we are quite certain that the facts should be stated which bring the party within the provisions of the statute. It is to be noticed that the exceptions in the statute are not such as are ordinarily introduced in legislation affecting the act done, but

relate entirely to the person, and, without these exceptions, the law would perhaps be construed the same as with them. See *Commonwealth v. Jennings*, 121 Mass., 47. But two classes of persons are referred in to the proviso.

The first class includes "any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remained absent for the space of seven years together, the party marrying not knowing the other to be living." In such case the party is presumed to be dead; and, although, if he or she should return, the marriage might be void, it certainly would be straining the law to hold such one criminally guilty in doing an act which he or she, by law, might properly presume to be a lawful act: *Commonwealth v. Thompson*, 6 Allen, 591, and 11 Allen, 23. The other class includes such as are unlawfully divorced, being innocent. Under the law he or she is entitled to have the marriage contract dissolved. Certainly, without any proviso or exception, no such person, on marrying again, could be deemed to be guilty of polygamy; and it is not improbable that the exception was inserted out of extreme caution, and possibly because the act of 1784 had an exception of a similar character. It was this: "Provided also, that this act, or anything therein contained, shall not extend to the wife of any married man who shall willingly absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the meantime, if it shall be in his power so to do."

The statute of 1784 was but a re-enactment, with, of course, a different penalty, of the Province Law of 6 Wm. and M. (1694-5), chapter 5, against polygamy, with a proviso in relation to continuous absence, in almost the identical language of the General Statutes, chapter 165, 1 Province Laws (state ed.), 171. The Statute of 6 Wm. and M., chapter 5, contains also a proviso excepting from its operation divorced parties, but does not distinguish between the guilty and innocent party, its language being, "shall not extend to any person or persons that are, or shall be at the time of such marriage, divorced by any sentence had, or hereafter to be had, as the law of the province in that case has provided."

Whether the guilty party would at that time have been deemed a divorced party, it is not necessary to inquire. Four years later, by statute 10, William III. (1698), chapter 19, the proviso in relation to time of absence was modified, and it was enacted, "that if

any married person, man or woman, has lately or shall hereafter go to sea in any ship or other vessel, bound from one port to another, where the passage is usually made in three months' time, and such ship or other vessel has not been, or shall not be heard of within the space of three full years next after their putting to sea from such port, or shall only be heard of under such circumstances as may rather confirm the opinion, commonly received, of the whole company being utterly lost, in every such case, the matter being laid before the governor and council, and made to appear, the man or woman, whose relation is in this manner parted from him or her, may be esteemed single and unmarried, and upon such declaration thereof, and license obtained from that board, may lawfully marry again, any law, usage or custom to the contrary notwithstanding:" 1 Prov. Laws, 353.

Such being the history of the law and its condition till 1841, we feel warranted in inferring that, at that time, the legislature did not deem the marriage of the guilty party who had been divorced to be polygamy, for in that year was enacted the following statute:

"Whenever a divorce from the bond of matrimony shall be decreed for any cause allowed by law, the guilty party shall be debarred from contracting marriage during the lifetime of the innocent party; and if the guilty party shall contract such marriage the same shall be void, and such party shall be adjudged guilty of polygamy:" Stat. 1841, c. 83. This is substantially re-enacted in the General Statutes, chapter 107, sec. 25.

This kind of legislation has many precedents. Any person who embezzles property is deemed by the statute to have committed the crime of larceny; it is not sufficient, however, in an indictment for such offense, simply to charge stealing in the usual manner, but the facts which constitute the embezzlement must be set out, with the averment of the legal conclusion that thereby and by force of the statute the party charged has committed the crime of larceny.

If, however, we assume that, prior to the statute of 1841, a divorced party, being the guilty cause of the divorce, might be guilty of polygamy by marrying again during the life of his former wife, still the result must be the same, in this case, as if no such offense could, prior to that statute, be committed, for it is quite clear that, under the existing statutes, the crime of poly-

gamy may be committed by persons under entirely diverse circumstances, and, by the familiar rules of pleading, a party charged with an offense is entitled to a statement in the indictment of the facts which constitute the offense; and if an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance. It is clear, therefore, that whether we decide that the offense of polygamy might have been committed by the guilty divorced party or not, the result must be the same, for the facts proved would show either that no crime was committed, or, if committed, there was a variance between the allegeate and the probata.

New trial ordered.

NOTE.—In *State v. Weatherby*, 43 Me., 258, the Supreme Court of Maine was called upon to consider the effect of a statute similar in its terms to that on which the indictment in *Commonwealth v. Richardson* is framed. They point out that it is only by inference, if at all, that the guilty cause of a divorce incurs the penalties of bigamy by marrying again, and express doubt whether or not it would have that effect. But they decide clearly that whether or not, under such a statute, the accused person is guilty of any offense, he certainly cannot be guilty of bigamy, because the first marriage tie cannot be dissolved as to one without being dissolved as to the other. On this ground they held the defendant, who was the guilty cause of a divorce in Maine, and who had married a second time in New Hampshire, and brought his second wife to Maine, and cohabited with her there, not guilty of adultery. And in *People v. Horey*, 5 Barb., 117, it was held, under a somewhat similar statute, that a person divorced for his own adultery was not guilty of bigamy in marrying again within the state.

It is a general rule, that a statute restraining the guilty party against whom a divorce has been granted from marrying again, has no force out of the state in which the divorce was granted, and it is also true that the provisions of such a statute do not affect the marriage, within the state, of a party against whom a divorce has been granted by the tribunals of another state. The prohibition does not, on the one hand, take away the right of the party to marry out of the jurisdiction which imposes it; neither, on the other hand, does it apply to foreign divorces: 1 Bish. Mar. and Div., sec. 306; and see 2 *Id.*, sec. 701, *et seq.*, and cases there cited; *Reed v. Hudson*, 13 Ala., 570; *Van Storek v. Griffin*, 71 Pa. St., 240; *Com. v. Lane*, 113 Mass., 458; *Dickson v. Dickson*, 1 Yerg. (Tenn.), 110.

And in *Putnam v. Putnam*, 8 Pick., 433, it was held, that where the guilty divorced person left the state and was married in another state for the very purpose of evading the statutory prohibition, and returned to Massachusetts to reside immediately after the second marriage, that the second marriage

must be regarded as valid in Massachusetts. In North Carolina, on the other hand, it was held, that if the guilty person went into another state to be married a second time, simply to avoid and evade the provisions of the North Carolina statute, his second marriage would be held void in North Carolina.

EX PARTE GARST.

(Nebraska. Opinion Filed February 13, 1880.)

FORMER JEOPARDY: *Preliminary examination—Change of Venue.*

The discharge of a person charged with felony on his examination before a committing magistrate, is no bar to a second examination before the same or a different magistrate, on another complaint charging the same offense.

Under the Nebraska statute, providing for a change of venue, but one change of venue can be had for the same cause, in the same proceeding.

MAXWELL, C. J. This is an application for a writ of *habeas corpus*. The application states that the petitioner, on the nineteenth day of January, 1880, was arrested and brought before the county judge of Gage county for examination, on a warrant issued by the coroner of said county, and that thereupon, on the twentieth of said month, said judge, in the presence of the accused, proceeded to inquire into the charge of manslaughter made against said Garst, and that upon a full examination of said charge said judge found that no crime had been committed, and thereupon discharged the accused, which judgment and order still remains in full force and unreversed. The application also states that on the twenty-second day of January, 1880, after said Garst had been discharged by the order and judgment of said county judge, a warrant was issued by one E. M. Hill, a justice of the peace of said county, and that thereupon said Garst was again arrested and taken before said justice to answer the charge of killing one Peter Keller, upon which charge he had been examined and discharged by the county judge; that thereafter said prisoner obtained a change of venue, because of the interest of said Hill, said cause being transferred to one Joseph Lowe, a justice of the peace of said county; that on the twenty-third day of said month the petitioner objected to the jurisdiction of said justice to again examine into said cause, and asked to be discharged, which objection was overruled; that on the thirtieth day of January said petitioner made application

for a change of venue, and filed an affidavit with said justice before entering upon the merits of the case, stating that the defendant could not, as he verily believed, have a fair and impartial hearing before said justice, on account of his bias, which motion was overruled; that thereupon an examination of the petitioner was had before said justice, and he was bound over in the sum of \$1,300 for his appearance at the next term of the district court, in default of which he was committed to the jail of said county, and a copy of the warrant of commitment is set out in the application.

The principal points upon which it is claimed the petitioner should be discharged are: *First*. That having been discharged by the county judge, he could not again be arrested and examined for the same offense. *Second*. That the justice of the peace, Lowe, should have granted a change of venue.

Section 286 of the Criminal Code provides that "whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the person accused, if he shall have reasonable grounds to believe that an offense has been committed."

Section 302 provides that "if, upon the whole examination, it appears that there has been no offense committed, or that there is not probable cause for holding the prisoner to answer the offense, he shall be discharged."

An examination of a person accused of a felony before a committing magistrate is in no sense a trial. If so, the officer would have no jurisdiction whatever. The object of an examination is: *First*. To ascertain whether an offense has been committed; *second*, if so, whether there is probable cause to believe that the accused committed it. Where a complaint is made under oath, before a magistrate, charging a party with the commission of an offense, such magistrate has authority to issue a warrant for the arrest of the accused, and the examination which follows is for the purpose of determining whether sufficient cause exists for his retention to abide the action of the grand jury. The grand jury may refuse to indict even if the accused is bound over, or they may find an indictment even if he is discharged. But his discharge by one magistrate is no bar to an examination for the same offense in case the proper complaint is made before the

same or another magistrate. It is urged that a party accused of an offense might thus be subjected to great annoyance by reason of repeated re-examinations. While this is true, and if there is not a reasonable ground of suspicion, a party may maintain, in a proper case, an action for malicious prosecution for injuries sustained by such prosecutions, yet such re-examinations afford no grounds of themselves to justify the issuance of a writ of *habeas corpus*.

As to the second proposition, the act to allow "a change of venue in civil and criminal proceedings before justices of the peace, on account of the interest, bias or prejudice of the justice," approved March 25, 1871, provides "that in all civil and criminal proceedings before justices of the peace, any defendant in such proceedings may apply for and obtain a change of venue by filing an affidavit in the case made by the defendant, his agent or attorney, stating that the defendant cannot, as he verily believes, have a fair and impartial hearing in the case on account of the interest, bias or prejudice of the justice, and by paying the costs now required to be paid by defendant on change of venue, for the causes and in the cases mentioned in chapter four, of title thirty, part two, of the Revised Statutes, and thereupon the proceedings shall be transferred to the nearest justice of the peace to whom the said objections do not apply, of the same county, to be proceeded with in the manner pointed out for the transfer and procedure in cases of change of venue for cause mentioned in said section four." This act applies to all proceedings, civil and criminal, before justices of the peace, and when a proper affidavit is filed stating the facts required by the statute, and the application is made before entering upon the merits of the case, the justice has no discretion in the premises, but must make the change as desired. If objections are known to exist against the nearest justice to whom the cause could be transferred at the time the application is made, they should be stated in the affidavit, or brought to the attention of the justice before the change is made, and if not so brought to his attention they will be waived. No second change in the same proceeding will be allowed for the same cause.

In the case at bar no objections were made by Garst or his attorneys to the justice Lowe at the time the change of venue was made by the justice Hill; nor is there anything in the record showing that they were not aware of any bias on his part

until after the cause had been transferred to him. This should appear in the record to be available; but even if it did, this is not a proceeding to correct errors in the proceedings of the justice, and when there is sufficient evidence of probable cause against the accused, such errors afford no grounds for relief in this proceeding.

The law as to change of venue was designed to give a defendant a trial or examination before a justice having neither interest nor bias nor prejudice against him, and so far as it secures fair and impartial trials and examinations it is conducive to justice. But it cannot be denied that changes of venue are frequently sought on the most trivial and flimsy pretexts, and when the affiant would find it difficult to assign any valid reason for his so-called belief as to the interest, bias or prejudice of the justice. No particular objection is shown to the warrant, and it seems to be sufficient.

As the application fails to show a cause of unlawful imprisonment, the writ must be denied.

Writ denied.

STATE v. WILES.

(Minnesota. Opinion filed March 1, 1880.)

A conviction for simple larceny of a hat (of the value of four dollars) is a bar to an indictment for larceny of the same from a shop, the stealing in both cases being one and the same.

Certified from district court, Freeborn county.

John A. Lovely, for respondent.

O. Mosness, for appellant.

BERRY, J. The defendant was indicted in the district court for Freeborn county, for stealing a hat (of the value of four dollars) in a shop. His plea was that he had been duly convicted of the same offense by the city justice of the city of Albert Lea, in that he had been so convicted of simple stealing of the hat, though not of stealing the same in a shop. For the purposes of this case, it is sufficiently accurate to say that the criminal jurisdiction of the city justice of Albert Lea is the same as that of a justice of the peace. Simple larceny of property, not

exceeding twenty dollars in value, is a misdemeanor, punishable by imprisonment in the county jail not more than three months, or by fine not exceeding one hundred dollars: Gen. St., 1878, c. 95, sec. 25.

Larceny in a shop is a felony, punishable by imprisonment in the state prison not more than three years, nor less than one year, or by imprisonment in the county jail not more than one year, nor less than three months, or by fine not exceeding five hundred dollars: *Id.*, sec. 23.

These references made it appear that, in contemplation of the statute, larceny in a shop (which is a species of compound larceny) is a higher offense than simple larceny of property not exceeding twenty dollars in value. The question for us is, whether conviction for the latter is a bar to an indictment for the former, the statute in both cases being one and the same.

In chapter one hundred and fourteen, section nineteen, General Statutes, 1878, it is provided that "upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto; upon an indictment for any offense, the jury may find the defendant not guilty of the commission thereof, and guilty of an attempt to commit the same; upon an indictment for murder, if the jury find the defendant not guilty thereof, they may, upon the same indictment, find the defendant guilty of manslaughter in any degree. In all other cases, the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment."

Under the latter provision of this section, a person indicted for larceny in a shop can properly be convicted for simple larceny, the commission of simple larceny being necessarily included in compound larceny from a shop: *State v. Owens*, 22 Minn., 238; *State v. Vadnais*, 21 Minn., 382; *State v. Eno*, 8 Minn., 220, and see, also, Gen. St., 1878, c. 91, sec. 11.

The constitution of this state provides that "no person for the same offense shall be put twice in jeopardy of punishment."

The offense of simple larceny, being included in the offense of compound larceny from a shop, if, after having been convicted of simple larceny, a person can be convicted of compound larceny from a shop, the act of stealing being the same in both cases, the result is that he is twice put in jeopardy for the simple

larceny. If after having once been punished for the simple larceny, he is again punished for a compound larceny, in which the simple larceny is included and of which it is a necessary ingredient, then he is twice punished for the same larceny—once upon his conviction of simple larceny alone, and a second time upon his conviction of the same simple larceny as a part of a compound larceny. This double conviction and punishment are forbidden by the constitution. As to the proposition involved in this conclusion, the authorities are irreconcilable, but we think it is supported by the weight of authority and the better reason: *Regina v. Elsington*, 9 Cox Cr. Cases, 88; *Com. v. Curtis*, 11 Pick., 133. And see *Com. v. Cunningham*, 13 Mass., 245; *State v. Lewis*, 27 Hawks., 98; *State v. Shepard*, 7 Conn., 54; *State v. Chapin*, 2 Swan., 493; 1 Bish. Cr. Law, secs. 885-889, *et seq.*; 1 Bennett and Heard Lead. Cr. Cases (2d ed.), 538, where the following rule of law is laid down, viz.: "A former conviction or acquittal of a minor offense is a bar to a prosecution for the same act, charged as a higher crime, whenever the defendant on trial of the latter might be legally convicted of the former, had there been no other prosecution." In 1 Wharton's American Criminal Law, section 563, the statement is that "if, on a trial of the major offense, there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major."

These authorities all proceed upon the basis that a second conviction, after such former conviction, is a putting in jeopardy twice for the same offense. The authorities, however, do not hold, and we are not to be understood as holding, that a former conviction of a minor offense, obtained by fraud and collusion, for the very purpose of preventing a conviction of a major offense, will bar a second prosecution for the latter.

Our answer, then, to the question certified, is that the conviction of simple larceny before the city justice of Albert Lea is a bar to a prosecution for the compound larceny charged in the indictment.

RENEAU V. STATE.

(2 Lea, Tenn., 720.)

HOMICIDE: *Constable killing prisoner to prevent his escape*

A constable has no right to kill a prisoner, in custody for a misdemeanor, to prevent his escape; and, if he does so, he will be guilty of murder or manslaughter, as the case may be.

McFARLAND, J. The prisoner appeals from a conviction of manslaughter for the killing of Vineyard Thomas.

The facts are that Thomas, the deceased, was arrested by the prisoner, who was a constable, under a warrant charging an assault and battery, before the justice of the peace. Thomas pleaded guilty, and was adjudged to pay a fine and costs, and in default of security was committed to jail, and in the execution of a mittimus issued by the justice for that purpose, the prisoner started with Thomas to the county jail, accompanied by another person as guard. On the route Thomas started to run and make his escape. Neither the prisoner or his guard pursued, but after commanding Thomas three times to halt, and not being obeyed, the prisoner fired two shots at Thomas, one of which took effect, killing him almost instantly. The prisoner is shown to be a man of good character, and he expressed regret at the result, saying that he did not intend to kill the deceased.

The latter was of bad character for violence, and had threatened that he would not submit to arrest. The law on this subject, as laid down by Mr. Bishop, is, in substance, that an officer having a prisoner in custody for felony, who attempts escape, will be excused for killing him if he cannot be otherwise retaken, but if he can be otherwise retaken, in any case, without resort to such harsh measures, it will be at least manslaughter to kill him. But in cases where the person slain is arrested or held in custody for a misdemeanor, and he fly or attempt to escape, it will be murder in the officer to kill him, although he cannot be otherwise overtaken; yet, under some circumstances, it may be only manslaughter, as if it appeared that death was not intended: 2 Bishop's Cr. Law, secs. 648, 649.

It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life. And we may

add that it may be a question worthy of consideration, whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life. The charge of the judge in this case was in accord with the law as above stated, and the jury having given the prisoner the benefit of all doubts, and convicted him of the lower grade of homicide.

It is argued that the offense for which the deceased was arrested was in reality a felonious assault, and the prisoner had the right to hold him in custody for this grade of offense; but it clearly appears that the warrant under which he was arrested charged only an assault and battery, and the judgment and mittimus of the justice only committed him in default of security for fine and costs for a misdemeanor.

We see nothing to change the principle, in the fact that the deceased had been adjudged to pay the fine and costs by the justice of the peace, as to the duties of the officer. His duties were the same, whether he held the prisoner in custody after or before the judgment of the justice. The prisoner, doubtless, acted under the belief that erroneously prevails as to the rights of a public officer—that is, that he may lawfully kill a prisoner if he fails to obey his command to halt. This is a very erroneous and very fatal doctrine, and must be corrected. Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of firearms or dangerous weapons, and that they will not be excused for taking life in any case, where, with diligence and caution, the prisoner could be otherwise held.

While the prisoner, in this case, seems to have honestly entertained the opinion that his duty required him to do what he did, and to have acted entirely without malice, and while he is entitled to strong sympathy, still we are constrained to affirm the judgment.

VOL. II.—40

STATE V. KAUFMAN.

(Iowa. Opinion filed September 18, 1879.)

JURY: Waiver.

A defendant in a criminal action may, with the consent of the state and court, waive a statute enacted for his benefit, or his right to be tried by a full jury of twelve. Evidence held sufficient to support the verdict.

Appeal from Iowa district court.

The defendant was indicted for uttering and publishing a forged promissory note with intent to defraud. Upon the trial, one of the jurors "being ill, with the consent of defendant said juror was discharged, and with the consent of the defendant the trial, before eleven jurors, was resumed and concluded by the order of the court." There was a verdict of guilty. A motion was filed in arrest of judgment, and for a new trial, on the ground that no legal judgment could be rendered on such a verdict. Both motions were overruled and judgment pronounced.

The defendant appeals.

Hedges & Alverson and *J. W. Slater*, for appellant.

J. F. McJunkin, attorney-general, for the state.

SEEVERS, J. 1. It is provided by statute that "the jury consists of twelve men accepted and sworn to try the issue. All qualified electors of the state * * * are competent jurors in their respective counties:" Code, secs. 227, 4397.

Both these statutory provisions have equal force. If one can be waived, so may the other. It was said in *The State v. Groom*, 10 Iowa, 308: "If the defendant knew at the time the jury was sworn that any of them were not qualified to act as jurors, he would have waived his right to object thereafter." This decision was made under the Code of 1851. But sections 1630 and 2971 thereof are precisely the same as sections 227 and 4397 of the Code. That a defendant in a criminal action by silence may waive the benefit of a statutory provision was clearly recognized. There are several other decisions which recognize the same principle: *Hughes v. The State*, 4 Iowa, 554; *The State v. Ostrander*, 18 Iowa, 435; *The State v. Ried*, 20 Iowa, 413, and *The State v. Felter*, 25 Iowa, 67. It must, therefore, be regarded as

the settled doctrine in this state that a defendant in a criminal action, with the consent of the state and court, may waive a statute enacted for his benefit.

2. The constitution provides that "the right of trial by jury shall remain inviolate, * * * but no person shall be deprived of life, liberty or property without due process of law:" Article 1, sec. 9, Code, 770.

That the jury contemplated by the foregoing provision should consist of twelve competent persons, will be conceded. The question for determination is, whether a defendant in a criminal action, with the consent of the state and court, can waive the foregoing constitutional provision and is bound thereby. The first impression would be, we think, that a constitutional provision could be waived as well as a statute. Both, in this respect, have equal force, and were enacted for the benefit and protection of persons charged with crime. If one can be waived, why not the other? A conviction can only be legally obtained in a criminal action upon competent evidence; yet, if the defendant fails at the proper time to object to such as is incompetent, he cannot afterwards do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that "the state (the public) have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law." The same thought is otherwise expressed by Blackstone, vol. 4, 189, that "the king has an interest in the preservation of all his subjects." It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were there present and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his

liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule. It may be said that if one juror may be dispensed with so may all but one, or that such trial may be waived altogether and the trial had to the court. This does not necessarily follow.

It will be time enough to determine such questions when they arise. Certain it is that the right to dispense with one or more jurors cannot be exercised without the consent of the court and state, and it may safely, we think, be left to them as to when or to what extent it may be exercised. We, however, may remark, without committing ourselves thereto, that it is difficult to see why a defendant may not, with the consent of the court and state, elect to be tried by the court. Should such become the established rule, many changes of venue based on the prejudice of the inhabitants of the county against the defendant might be obviated. The authorities are not in accord on the question under discussion. The foregoing views are sustained by *Commonwealth v. Dailey et al.*, 12 Cush., 80; *Murphy v. Commonwealth*, 1 Met. (Ky.), 465; *Tyra v. Same*, 2 Met. (Ky.), 1. The crime charged in these cases was a misdemeanor, but in the first case this fact possessed no significance. The ruling is based on principles applicable to all criminal actions. We are unable to see how it is possible to draw a distinction in this respect between misdemeanors and felonies, because the constitution does not recognize any such distinction. The contrary conclusion was reached in *Canceme v. The People*, 18 N. Y., 128; *Allen v. The State*, 54 Ind., 161, and *Bell v. The State*, 44 Ala., 393. In neither of these cases was the question largely considered. Substantially, they all seem based on the thought that "it would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and law establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think ought not to be tolerated;" *Canceme v. The People*, before cited. This would have been much more convincing and satisfactory if we had been informed why it would be "highly dangerous" and should "not be tolerated," or at least something which had a tendency in that direc-

tion. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used.

In *Bullard v. The State*, 38 Texas, 504, the verdict was rendered by thirteen jurors. It was set aside; but it does not appear whether or not the defendant had any knowledge, until after verdict, there was that number of jurors. In *Williams et al. v. The State*, 12 Ohio St., 622, a jury trial was waived, and the defendants found guilty by the court. On appeal, the attorney-general submitted to a reversal, on the ground that a jury trial could not be waived. The case was disposed of by the court in a single line, by saying such was the opinion of the court. It is evident the case was not very elaborately considered. The following cases hold that a trial by jury cannot be waived, and the same take place before the court: *Bond v. The State*, 17 Ark., 290; *The People v. Smith*, 9 Mich., 193; *Leagu v. The State*, 36 Md., 259. The constitution of this state provides that "in all criminal prosecutions * * * the accused shall have the right * * * to be confronted with the witnesses against him:" Article 1, sec. 10, Code, 770. In *The State v. Polson*, 29 Iowa, 133, "it was agreed in open court, between the district attorney and counsel of defendant, in the presence of the defendant and of the jury, that, in order to save time and facilitate the trial of the cause, the testimony taken upon the former trial should be read to the jury, as a substitute for the oral testimony of the witnesses in court."

A conviction followed, which was held to be right, and that the constitutional provision was a personal right, and in no manner affected the jurisdiction of the court, and that it might be waived. This decision in principle is identical with the case at bar. If one constitutional provision may be waived, why not another? The one is not more binding or obligatory than the other. Both are equally important.

3. No exceptions were taken to the instructions, but in the motion for a new trial it was objected that the verdict was not supported by the evidence. If the jury believed the witness Collins—and they must have done so—the conviction is undoubtedly right. Both the district court and jury have passed upon the sufficiency of the evidence, and the story told by Collins is not so improbable as to justify us in disbelieving him. Certain objections were made on the trial to the admission of evidence.

These are not in argument of counsel, but, as is our duty, we have examined them, and failed to find they, or any of them, are well taken.

Affirmed.

STATE V. HAYS.

(2 Lea, Tenn., 156.)

FORMER JEOPARDY: *Verdict in absence of prisoner.*

If the jury come into court and render a verdict of guilty, and are discharged, in the absence of the prisoner, who is in the custody of an officer in another room, the prisoner is entitled to a new trial, but he is not entitled to a final discharge.

TURNEY, J. The defendant was indicted for and convicted of grand larceny. When the jury came into court with its verdict the accused was not present, but was in the custody of an officer, and handcuffed, in another room.

After the jury had been discharged and had retired, the prisoner was brought into court, when he moved to be discharged, which was done, and the state appealed.

It is now insisted the defendant was, by the proceeding of that trial, once in jeopardy, and cannot lawfully be put upon trial the second time for the same offense.

A number of cases are cited and relied upon to sustain the position. An examination of the cases show that the discharge of the jury was without consent of the accused, and before, or, rather, without verdict. All proceed upon the hypothesis that at the time of the discharge of the juries there was a chance or a probability, or at least a possibility, of acquittal, and that, under the circumstances, it was presumable the defendant could not be placed in so favorable position before another jury.

The rule established by the constitution is in favor of life and liberty, and is meant really to protect against repetition of prosecution when there has been one acquittal or conviction unappealed from and unreversed. It does not obtain in a case like the present, when the prisoner can be returned to as favorable surrounding on a second trial as he was upon the first, as the result of the one shows, and will not be incurring the jeopardy guarded against by the constitution on the second trial.

The cases cited have gone the full length of securing the person accused of crime protection against a second jeopardy, and we are not at all disposed to extend the construction. It was error to discharge the prisoner. The court should have granted a new trial.

Reverse the judgment, and remand the cause for trial.

STATE v. BLOEDOW.

(45 Wis., 279.)

MAYHEM: *Intent to be found by jury—Verdict.*

In criminal law, when a special intent, beyond the natural consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved and found.

Where defendant had destroyed the eye of a person by throwing a stone at him, the information for mayhem charged the malicious intent in the words of the statute. Verdict that defendant was "guilty as charged in the information, with the malicious intent as implied by law." *Held*, that this does not find the malicious intent as a fact with sufficient certainty to sustain a judgment for mayhem.

But the information charging an assault and battery, the verdict will sustain a judgment for that offense.

Reported by the judge of the municipal court of Milwaukee county.

Defendant was tried upon an information, the third count of which charged that, "on," etc., said defendant, "contriving and intending the said John Mennier to maim and disfigure, in and upon the said John Mennier, unlawfully, willfully and maliciously did make an assault, and that he, the said Charles Bloedow, with malicious intent, then and there to maim and disfigure the said John Mennier, the left eye of him, the said John Mennier, unlawfully, willfully and maliciously then and there did put out and destroy." The verdict found defendant "guilty as charged in the third count of the information, with the malicious intent as implied by law."

The judge of the municipal court reported the case to this court, under the statute, for a determination of the question, whether, upon the verdict, any punishment could lawfully be inflicted on the defendant.

James Hickcox, for the defendant.

F. W. Cotzhausen, of counsel for the state.

RYAN, C. J. The defendant was charged with mayhem. The statute defining the crime requires the assault to be made with malicious intent to maim or disfigure. Maiming, without intent to maim, is not within the statute. The information charged the malicious intent in the words of the statute. The verdict found the defendant guilty, as charged in the information, with the malicious intent as implied by law. And the question certified here by the court below is, whether the defendant can be punished upon the verdict.

Generally, the law will imply an intent to do the thing done. But, in criminal law, when a special intent, beyond the natural consequences of the thing done, is essential to a crime charged, the special intent must be pleaded, proved and found. The intent may be proved in various ways.

Surrounding circumstances generally go far to show it. Sometimes the very act itself does. Thus, if one shoot another with a rifle in a vital part of the body, the act raises a presumption of intent to kill, unless the circumstances under which it is done go to repel the presumption.

So, if one throw a stone at another, the act raises a presumption of intent to injure generally, unless repelled by the circumstances under which it is done. But the law will not presume a special intent beyond the natural consequences of the act done. The special malice or intent is a fact which the jury must find, to warrant judgment on their verdict.

The difficulty with the verdict in this case is, that the jury, in effect, find the act, but leave the special intent or malice to implication of law; that is to say, they find the defendant guilty of the act charged, but leave the intent of the act to the judgment of the court. The verdict is very vague, but this appears to be its true construction. And even if this be not, the verdict is too uncertain to support a judgment for mayhem.

The facts in this case go far to illustrate the rule as it has been stated. The defendant threw a stone at another. The stone destroyed an eye. But the mere throwing of the stone, of itself, indicates no intent to inflict the natural injury, or any special injury. Such an injury is not a natural consequence of the assault committed. If, as has happened to the

disgrace of humanity, one engaged in a fight gouge out his adversary's eye, the act—unexplained by circumstances—may be sufficient proof of the malicious intent to maim. But the mere throwing of a stone is generally not sufficient evidence of an intent to maim, merely because it does maim; for that result, though possible, must be rare, and may happen without the intent or with it. Generally, such a result would be merely accidental.

The information charges an assault and battery. The verdict clearly convicts the defendant of that, and for that the defendant may be punished: *Sullivan v. The State*, 44 Wis., 595.

The answer of this court, therefore, to the question certified by the court below is, that the defendant may be punished upon the verdict for assault and battery, and for that only.

NOTE.—It is not difficult to understand how the confused ideas of fact and law, which are exhibited in the verdict in this case, found their way into the jury room. Courts have been in the habit of instructing juries as to what "the law presumes" from a given state of facts. Thus, juries are commonly told that "the law presumes a man to intend the natural and probable consequences of his acts." That "from a willful killing, with a dangerous weapon, the law raises a presumption of malice, and that, presumably, it is murder in the second degree." That the "recent unexplained possession of stolen property raises a presumption that the person in whose possession it was found was guilty of the larceny." Receiving such instructions, it is little wonder that the jury, in this case, thought the law was ready to supply the malicious intent which they neglected to find. But, in truth, it will be found upon investigation, that all of these so-called presumptions of law are mere rules of practice—rules of experience and common sense—which are stated to juries to guide and assist them in their deliberations, but which can never, as is shown by the judgment in this case, supply the existence of facts alleged in the indictment, and which the jury are required to find. In every criminal case the intent is a fact, and must be found as a fact by the jury. A very clear and eloquent statement of law on this head will be found in Erskine's argument in support of the rights of juries in the Dean of St. Asaph's case. A very simple test will determine that the so-called presumptions of law are mere rules of practice. If in a homicide case, the jury should find simply that "they found that the defendant killed the deceased by shooting him with a pistol," would any judge be found hardy enough to pronounce sentence upon it as upon a verdict of guilty of murder in the second degree? The most rational doctrine upon this subject is announced by the Supreme Court of Michigan, in *Hamilton v. People*, 29 Mich., on page 193. The court says: "It is very well remarked by a modern writer on evidence, that 'artificial presumption can never be safely established as means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be explained by the conviction of an hundred criminals who might otherwise

have escaped: 2 Hale, 289. From such presumptions the common law is justly most abhorrent; and happily our statute book has not been disgraced by many violations of the humane principles of the common law, in this respect: Stark Ev., sec. 743.' *There is no conclusion or presumption of fact which is not entirely within the disposal of the jury*, as it is also entirely for them to determine what portion to believe or disbelieve; and it is the conscience of the jury that must pronounce the prisoner guilty or not guilty: 2 Hale, 313."

STATE V. GRIFFITH.

(67 Mo., 287.)

MARRIAGE: *Unlawfully joining minor in marriage—Evidence as to minor's appearance.*

In a prosecution for unlawfully joining a minor in marriage, without the consent of her parent or guardian, the defendant has no right to show the size, appearance and general development, for the purpose of proving her age. The evidence is incompetent.

If such evidence is receivable in mitigation of punishment, its rejection will not be held error where the trial judge has already inflicted the lightest penalty provided by the statute.

In a prosecution for unlawfully joining a minor in marriage, it is no defense, that the respondent acted in good faith, and that he honestly believed the minor to be of full age.

NORTON, J. The defendant was indicted at the December term of the circuit court within and for Knox county, for marrying a minor without the consent of her parent or guardian. Defendant was tried, convicted, and his punishment assessed to one month's imprisonment in the county jail, from which judgment he has appealed. The indictment is framed on sections five and eleven, Wag. Stat., 930, and sufficiently charges the offense created thereby. The evidence, on the part of the state, tended to establish the allegations of the indictment, and the only matter of error complained of was the refusal of the court to permit a witness, on the part of the defendant, to state the size, appearance and general development of Sarah E. Demoss, the minor alleged to have been married, at the time the defendant performed the ceremony.

It is claimed that the evidence offered was admissible for the purpose of showing that said Sarah was over the age of eighteen years, and if not for that purpose, it should have been received

in mitigation of punishment. Had the witness been permitted to answer the questions, and given his opinion founded upon her appearance and size, that the said Sarah was over eighteen years of age, we cannot perceive how it would have relieved defendant from liability, in view of the object of the statute. The law provides a way in which any person performing the marriage ceremony may protect himself from the penalties it imposes. In the case of *Beckham v. Macke*, 56 Mo., 548, where the minor was nineteen years old, it was held that the fact that he had the appearance of being over twenty-one, and had induced the defendant to perform the ceremony by falsely representing that he was of age, would not relieve defendant from liability.

"The statutes provides the means by which a person performing the ceremony may protect himself. He must have the written consent of the parent, guardian, or other person having charge of the minor. It is not sufficient that he should act under the *bona fide* belief that such minor was of age. His honest mistake in this regard will not protect him. The law explicitly declares what is required for his protection, and unless he adopt the means pointed out, he must suffer the consequences." In regard to the question of the age of a person, family records are receivable in evidence, and general repute in the family is sometimes admissible, but to allow the question, when susceptible of direct proof, to be determined by the mere opinions of witnesses founded on size and general appearance, finds no support either in principle or authority. The statement made by Bryant, the person to whom defendant married the said minor, that she was of age, and his reliance thereon does not shield him, and if he saw fit to determine for himself her age, by her looks, he did so at his peril: *Donahue v. Dougherty*, 5 Rawle, 124.

If even the evidence offered had been receivable for the purpose of mitigating the punishment (which question is not necessary to determine) its rejection would not have been reversible error, for the reason that the defendant sustained no injury thereby, as the judgment of the court shows that he was only subjected to the lowest punishment which could have been inflicted under the law.

Judgment affirmed, with the concurrence of the other judges.

Affirmed.

NOTE.—On the question of how far a *bona fide* and reasonable belief that the minor is of lawful age, is a defense in prosecutions of this nature, see *Reg. v. Prince*, 1 Am. Cr., 1; *Bonker v. People*, ante, p. 79.

McPHERSON V. THE COMMONWEALTH.

(28 GRATT., 939.)

MARRIAGE: *What is a negro.*

A marriage between a white man and a woman who is less than one-fourth of negro blood, however small this lesser quantity may be, is legal.
A woman whose father was white and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute.

These cases were separate indictments, the one against Rowena McPherson for living in illicit intercourse with George Stewart, he not being her husband, and the other against George Stewart for living in the same way with Rowena McPherson, she not being his wife. The proofs were that they had been married, and the only question in this court was, whether she was a negro, and, therefore, the marriage illegal, as Stewart was a white man. On that question, the facts proved are stated by Judge Moncure, in his opinion. Both the parties were found guilty and assessed with a fine. And they, thereupon, applied to this court for a writ of error, which was allowed.

George D. Wise, for the appellants.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court in *McPherson's case*.

The court, without deciding any of the questions presented by the first and second bills of exceptions, is of opinion, in regard to the question presented by the third bill of exceptions, that the hustings court of the city of Manchester erred in overruling the motion of the defendant in that court, the plaintiff in error, to set aside the verdict, because the same was contrary to the law and the evidence, and grant a new trial.

It appears, from the certificate of the facts which were proved upon the trial, that Rowena McPherson, with whom George Stewart is alleged to have intermarried, is not a negro, and,

therefore, the said marriage is not on that account illegal. It appears from said certificate, among other things, "that her father was a white man; that her mother was also by a white man, out of a brown skin woman; that Washington Goode, the half-uncle of the said Rowena McPherson, testified that the said brown skin woman, who was his grandmother, and the great grandmother of said Rowena McPherson, told him that she was a half-Indian, and that his mother, her daughter, also told him the same." It thus appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro.

Besides, having certainly derived at least three-fourths of her blood from the white race, she derived a portion of the residue from her great-grandmother, who was a brown skin woman, and, of course, not a full-blooded African, or negro, whose skin is black and never brown. It was said in the family that the said brown skin woman was a half-Indian—a fact which is confirmed by the color of her skin. If any part of the said residue of her blood, however small, was derived from any other source than the African or negro race, then Rowena McPherson cannot be a negro.

The court is, therefore, of opinion that the judgment of the said hustings court is erroneous, and it is considered that the same be reversed and annulled, that the verdict of the jury be set aside, and that the cause be remanded to the said hustings court for a new trial to be had therein, in conformity with the foregoing opinion.

Which is ordered to be certified to the said hustings court of the city of Manchester.

CHRISTIAN, STAPLES and BURK, JJ., concurred in the opinion.

In *Stewart's Case* the opinion and judgment was the same.

Judgment reversed.

NOTE.—The courts are not perfectly agreed as to what amount of negro blood will constitute a person a negro within the meaning of the statutes in which that term is used. In *People v. Dean*, 14 Mich., 406, where the case involved was, whether the defendant was entitled to vote, the constitution limiting the right of suffrage to "white male citizens," the majority of the court held only those are white who have less than one-fourth of negro blood in their veins. The same rule exists by statute in Mississippi: *Heirn v. Bridant*, 37 Miss., 209. In *Johnson v. Norwich*, 29 Conn., 407, a statute exempting from

taxation the personal and real estate of "persons of color," was held to include a person having one-fourth of negro blood. In *Bailey v. Fiske*, 34 Me., 77, a woman having one-sixteenth of Indian blood in her veins, was held to be a white woman, and her marriage with a mulatto to be void under the statute. But in North Carolina "person of color" is held to mean a person descended from a negro, within the fourth degree inclusive, so that in *State v. Dempsey*, 9 Ired., 384, the defendant, having only one-sixteenth of negro blood, was held to be a person of color, but if he had had any less, he would have been considered white.

STATE V. DOEPKE.

(68 Mo., 208.)

LARCENY: *Ownership of coffin used for burial—Criterion of value in larceny.*

It is larceny, at common law, to steal a coffin in which a body is interred, and Missouri statutes, punishing disintering and receiving the dead body, and opening the grave for the purpose of taking up the body or stealing the coffin, or anything buried with the deceased, in no wise abrogates or affects the common law rule.

In such a case it is proper for the indictment to allege the coffin to be the property of the one who furnished it for the burial.

Where the value of the article stolen is material in a prosecution for larceny, its value is to be fixed by its market price, and not by what it is worth to its owner, or for the particular purpose for which it is used. It is to be regarded as worth just what it would fetch in the open market.

HENRY, J. It is conceded by counsel for appellant, and fully established by the authorities, that a coffin in which the remains of a human being were interred, was a subject of larceny at common law. It is contended, however, that sections 11, 12, 13 and 14, of our act concerning crimes and punishments (Wag. Statutes, pages 500, 501), "stand in lieu of the common law as it existed in reference to the question under consideration, and that the acts alleged to have been committed by the defendant in this case, amounted to nothing more than a statutory misdemeanor." Section eleven provides a punishment for removing the remains of a human being from the grave or other place of interment. Section twelve makes it a misdemeanor for any one to receive such remains, knowing them to have been disinterred contrary to the provisions of the preceding section. These sections, it might be contended with plausibility, have superseded the common law in regard to the exhumation of the remains, but

have no bearing upon the question of stealing a coffin or grave clothes.

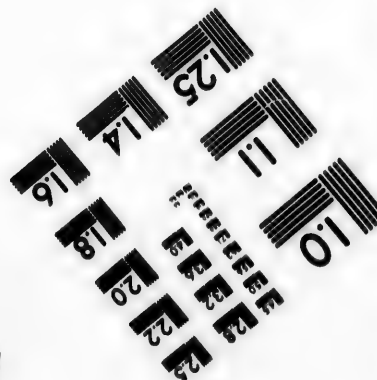
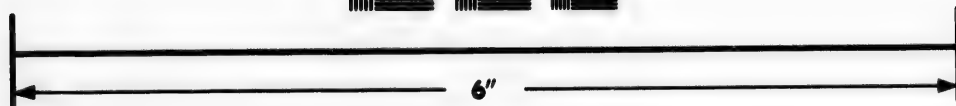
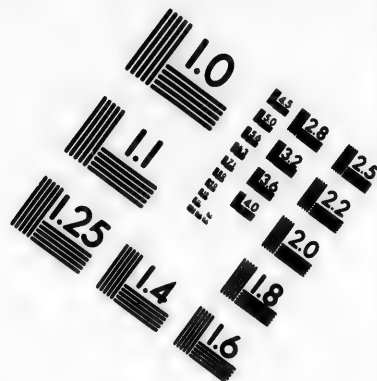
It was not larceny, at common law, to take a dead body from its place of interment, under any circumstances, but it was a misdemeanor, and as sections eleven and twelve expressly provide a punishment for that offense, as also for receiving the dead body, those sections may be taken to stand in lieu of the common law in relation to the removal of the remains of the dead.

Section thirteen provides that "every person who shall open the grave or other place of interment, or sepulture, with intent to remove the dead body or remains of any human being, for any of the purposes specified in section eleven of this chapter, or to steal the coffin or any vestment or other article, or any part thereof, interred with such body, shall, on conviction," etc.

This section provides a punishment for an attempt to remove the remains or to steal the coffin or any article interred with the body. There is no enactment in regard to stealing a coffin, and with what propriety can it be said that the legislature, having prescribed a punishment for one offense which was punishable at common law, has thereby repealed the common law in regard to a different and higher grade of offense? By the common law it was larceny to steal a coffin in which the remains of a human being were interred. It was, at common law, also a misdemeanor to attempt to commit that offense, and the argument urged here is, that inasmuch as our legislature has provided a punishment for the misdemeanor, it has thereby entirely superseded and abolished the common law as to the felony. We may not appreciate the force of the argument, but it comes far short of securing our assent to the proposition. That the stealing of a coffin is still larceny in this state is recognized in section thirteen, wherein it provides a punishment for the attempt to steal a coffin. We, therefore, conclude that, notwithstanding the enactment of those sections, a coffin in which the remains of a human being are interred is still a subject of larceny in this state.

It is insisted that the indictment is defective in failing to negative the exceptions contained in section fourteen. This question has been otherwise determined by repeated decisions of this court, and recently in the *State v. O'Gorman*, ante, p. 179.

The coffin was alleged, in the indictment, to be the property of one Makel, a son-in-law of the accused, and it is contended



Photographic Sciences Corporation

**22 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

13 128
12 132
11 125
10 22
9 20
8

10
11
12
13

that when he had the body interred he parted with all the property he had in the coffin, and that, therefore, the conviction of defendant cannot be sustained. Roscoe, in his work on criminal evidence, says: "A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased;" Page 604 (6th Am. ed.); 1 Chitty Crim. Law (5th Am. ed.), 44; 1 Hawkins P. C., 144, 148; Sharswood Black., 4th vol., 235. All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor, or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the deceased.

The court, for the state, instructed the jury that if they found that the coffin was of less value than ten dollars, and that defendant stole it, they should convict him of petit larceny. By another instruction they were told that in order to convict defendant of grand larceny they should find the coffin to have been of the value of ten dollars or more, and that it was sufficient if they found it to have been of that value to the owner, and that it was not required that it should be of that value to third persons, or that it would command that price in the open market. This latter instruction was erroneous. The authorities cited to support the doctrine it announced give it no countenance.

In 3 Greenleaf's Evidence, page 140, section 153, the author says: "Nor is it necessary to prove the value of the goods stolen, except in prosecuting under statutes which made the value material either in constituting the offense or in awarding the punishment.

"But the goods must be shown to be of some value at least to the owner, such as reissuable bankers' notes, or other notes completely executed but not delivered or put into circulation, though to third persons they might be worthless." It is clear that in the latter clause he was speaking of other prosecutions than those under statutes which make the value material, either in constituting the offense or awarding the punishment.

"By the English law, as it stood when this country was settled, larceny was divided into grand and petit; the former being committed where the goods stolen were over twelve pence in value, the latter where they were of the value of twelve pence or under:" Bishop's Crim. Law, vol. 1, sec. 679.

"In these valuations (says East) the valuation ought to be reasonable; for when the statute (of West. I., c. 15) was made, silver was but 20d. an ounce, and at the time Lord Coke wrote, it was worth 5s., and it is now higher: 2d East's P. C., 736. So Lord Coke, 2 Inst., 189, says: "The things stolen are to be reasonably valued, for the ounce of silver, at the making of this act, was at the value of 20d., and now it is at the value of 5s. and above." See, also, Black. Com., vol. 4, 237. The statute of Westminster I, chapter 15, referred to by these authors, was that by which the distinction betwixt grand and petit larceny was made.

By statutes seven and eight, George IV., chapter 29, section 2, that distinction was abolished, and every larceny, without regard to the value of the goods, was made grand larceny: Sharswood's Black., vol. 4, 230. When it is said by elementary writers, and in adjudged cases, that in order to constitute the offense of larceny it is sufficient if the thing stolen be of some value to the owner, however small, although to third persons worthless, the observations relate to the offense of petit larceny, or to simple larceny, under the statute seven and eight, George IV., and similar statutes, and are wholly inapplicable to grand larceny. Where a distinction is made by statute between that and petit larceny, based upon the value of the goods stolen, the remarks of East and Lord Coke, above quoted, show conclusively that the value of the goods was to be measured by the current coin of the realm, and that the cash value was that to be ascertained in determining whether the theft was grand or petit larceny.

If the criterion of the value, given by the court in the second of the above instructions be correct, one might be convicted of grand larceny for stealing a finger ring of the intrinsic or market value of five dollars, only because, forsooth, being a gift to the owner by a departed friend, or wife, or other loved one, he placed an estimate upon it far beyond its value, although of no greater value to third persons than another ring of the same kind which could be purchased wherever kept for sale for five dollars. The criterion of value by which the jury were told in that instruction they might be governed, does not apply, as a general rule, in civil proceedings, and when the statute requires that property stolen shall be of the value of ten dollars, in order to constitute the theft thereof grand larceny, the term "value" is to be taken in its legal sense, which does not differ from its com-

mon acceptation, and there is no warrant for allowing any other mode of ascertaining the value of stolen property in a criminal prosecution than that which prevails generally in civil proceedings. It is not the fancy estimate of value placed upon the property by the owner which is to determine whether the theft is grand or petit larceny, but its actual value, as that value is usually ascertained in other proceedings.

If one sue another for conversion of personal property, he recovers, not what the property was worth to him, but its value in the market; and it would be strange enough if, when the statute declares that no one shall be adjudged guilty of grand larceny, unless the goods stolen were of the value of ten dollars, a criterion of value should be adopted which would authorize a conviction for that offense, when the goods stolen are worthless to third persons, and of no market value, but possess a value which can only be measured by fancy or sentiment—a measure of value as uncertain and variable as the whims and caprices of the owner of the goods, or the witnesses he may introduce to prove their value.

We cannot substitute this for the stable and certain measure furnished by the price which such goods command in the market.

In some civil cases, we are aware, the jury are allowed to consider *pretium affectionis*, in estimating the value of property, but the reason for the departure from the general rule in those cases does not apply in a prosecution for stealing such property. The purpose of the prosecution is to punish the thief, not to compensate the owner of the property for his loss.

The judgment of the court of appeals is reversed, and cause remanded.

All concur.

Reversed.

REGINA v. HOLBROOK.

(13 Cox Cr., 650.)

LIBEL: Criminal liability of publisher for act of servant.

Upon a criminal information for libel, it was proved that the three defendants, the proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it. At the trial, evidence was tendered by the defendants to prove that the libel was published without their authority, consent or knowledge, and without want of due care or caution on their part, within the meaning of 6 and 7 Vict., chap. 96, sec. 7. The judge refused to hear this evidence, and directed the jury that the section did not apply. Upon a rule for misdirection, *held*, by Cockburn, C. J., and Lush, J. (dissentiente Mellor, J.), that, notwithstanding the authority to the editor, it was a question for the jury whether the protection given by this section applied to the defendants, and that there must be a new trial.

This was a criminal information for libel, tried at Winchester, before Lindley, J., and a special jury, a verdict of guilty having been found against the defendants, who are the proprietors and publishers of the *Portsmouth Times and Naval Gazette*.

The information had been granted at the instance of Mr. John Howard, the clerk of the peace for the borough of Portsmouth, who, in effect, had been charged, by an article in that newspaper, with having packed a grand jury at the borough quarter sessions, for the purpose of improperly dealing with an indictment for personation at a municipal election.

The defendants, who pleaded not guilty only, were proved to be the publishers of the paper, and to be actively engaged in the management.

It appeared, however, that they employed a competent editor to superintend that part of the paper in which the libel appeared, and he had general authority to publish whatever he thought proper. The defendants then tendered evidence to show their exemption from liability under the seventh section of Lord Campbell's act (6 and 7 Vict., c. 96).

This evidence the learned judge refused to admit, and he directed the jury that the defendants were not in a position to avail themselves of that section.

The words of the seventh section of 6 and 7 Vict., c. 96, are:

Reversed.

"That whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

On the 3d November, Cole, Q. C., obtained a rule *nisi* for a new trial on behalf of the defendants, on the ground of misdirection in the judge's statement that the defendants were criminally responsible for the publication of the libel, although they had appointed a competent editor to conduct the newspaper, and that the publication was made without their actual authority, consent or knowledge, and did not arise from want of due care or caution on their part.

Charles, Q. C., and A. L. Smith, now showed cause for the prosecution.

Here the evidence established an actual publication under the general authority given to the editor by the defendants, and, therefore, this was not the mischief aimed at by the remedy given in this section.

It was held by the exchequer chamber in *Parkes v. Prescott* (L. Rep., 4 Ex., 169), that the criminal liability for a libel published by authority, was more extensive even than the civil liability. No doubt, as far back as 1770, we find it stated that *prima facie* evidence of publication, such as public exposure for sale and selling at the defendant's shop, might be rebutted by evidence in exculpation: *Rex v. Almon*, 5 Burr., 2686; but there is no subsequent case in which that dictum has been acted upon. From that time the law and practice concerning libel seems to have become more stringent against publishers, except so far as Fox's libel act (32 Geo. III., c. 60) relieved them by empowering the jury to give a general verdict upon the whole matter in issue, and abolished the previous limitation of their right to consider the publication only, which was the law as laid down in *Rex v. The Dean of St. Asaph*, reported in a note to *Rex v. Wiltors* (3 T. Rep., 428). In 1819 (*Rex v. Walter*, 3 Esp., 21), Lord Kenyon said, at *nisi prius*: "He was clearly of opinion, that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants, or agents, for misconduct

or inform-
not guilty,
a presump-
act of any
nt to such
without his
publication
part."

e nisi for a
und of mis-
were crim-
though they
spaper, and
l authority,
of due care

ause for the
on under the
ndants, and,
the remedy

s v. Prescott
a libel pub-
an the civil
t stated that
exposure for
rebutted by
., 2686; but
as been acted
ng libel seems
cept so far as
empowering
atter in issue,
t to consider
wn in *Re v.*
Wilters
p., 21), Lord
opinion, that
inally as well
r misconduct

in the conducting of a newspaper. That was not his opinion only, but that of Lord Hull, Powell, J., and Foster, J., all high law authorities, and to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This ruling was followed by Lord Tenterden, at *nisi prius*, in *Re v. Gutch* (Moo. and Mack., 433), who, in summing up the second trial of the same defendant, said (p. 438): "I tell you to-day, as I thought myself bound to tell the jury yesterday, that the proprietor of a newspaper is criminally answerable for what appears in it; I do not mean to say, nor ever did mean to say, that some possible case may not occur in which he would be exempt, but generally speaking, he is answerable." So in Hawkins' Pleas of the Crown, Bk. 1, ch. 28, sec. 10, we find, "And it is said not to be material whether he who disperses a libel knew anything of the contents or effect of it, or not." There are also *dicta* of Lord Lyndhurst, C. B., and Alderson, B., in *Colburn v. Patmore* (1 Cr. M. and W., 73), which adopt this view of the law. The former said (p. 77): "There is this distinction between the case of libel and that of other acts committed by servants, that whether the libel be published negligently or willfully, the master is responsible, but in other cases, he is answerable only where the act is negligent." Alderson, B., added: "A master is presumed to authorize the insertion of a libel; in other cases, the master is not presumed to authorize the willful act of his servant in committing a tort. Does not the proprietor of a newspaper give authority to the editor to publish everything, libelous or not? Does not such a general authority cover the publication of a libel?" In the case above mentioned (*Re v. Gutch*) the defendants were proved to be proprietors of the newspaper in what is said to have been then the usual manner, by their affidavit filed at the stamp office, and no evidence on the point was offered. Similar evidence, by declaration and certified copy, was made conclusive against the publisher by 6 and 7 William IV., chapter seventy-six, section seven; and although that section was repealed by 32 and 33 Victoria, chapter twenty-four, section one, it was the law at the time Lord Campbell's act (6 and 7 Vict., c. 96) was passed, and that evidence must have been intended by the description of "evidence which shall establish a presumptive case of publication against the defendant," contained in the seventh section.

To meet this presumption created by the registration, that section provides a protection for a publisher if he can prove that the libel was published without his authority, consent or knowledge, and without want of due care or caution, as by the insertion of a libel by an unauthorized person. It was not, however intended in any way to apply to a case like the present, where the publisher's general authority to the editor is proved, nor where the publisher is the manager of his own paper, and no libel can appear in it if due care and caution be exercised. This is implied by the note to this section contained in Chitty's Statutes, volume 2 (3d edit., 1865), page 1254. That a general authority of this kind should render the defendants liable here is supported by the decision to that effect with respect to a fraudulent misrepresentation in *Barwick v. English Joint Stock Banks* (L. Rep., 2 Ex., 259). [Lush, J. That is with respect to civil liability.] It was similarly held, upon an indictment for a nuisance, in *Reg. v. Stephens* (L. Rep., 1 Q. B., 702).

Cole, Q. C., and Folkard, supported the rule. The last case cited (*Reg. v. Stephens*) was expressly determined on the ground that there was no other remedy but an indictment, and that it was in the nature of a civil proceeding.

In all cases of criminal liability, except libel, the rule is, and has always been admitted, that a person cannot be responsible, without knowledge and consent, for the illegal act of his servant or agent.

Even at the time of *Rex v. Almon*, in the year 1770, it was possible to rebut the exception to this rule with respect to libel. The presumption against the publisher, although strengthened by the course of practice before Lord Campbell's act, was always regarded as an anomaly; and it was to put an end to this anomaly, and not merely for the purpose of abolishing a particular mode of proof, that the seventh section was enacted. This is a case to which that section is exactly applicable, and the defendants ought to have been allowed to advance the evidence which they tendered at the trial.

COCKBURN, C. J. I am of opinion that this rule must be made absolute.

The facts, as I understand them, show that the defendants are the three joint proprietors of this newspaper; but it appears that, when not absent from Portsmouth, the duties of conducting the

paper are divided between four persons, viz., the three defendants and an editor appointed by them to manage the literary department.

The defendants undertake respectively the commercial, the advertising, and the publishing duties.

At the time of the publication of this libel, one of the defendants was absent in Somerset, on account of his health, and he, clearly, was not cognizant of the publication.

The others were present and discharging their ordinary duties; but, as the editor had full discretion to publish whatever he thought proper in that department which issued the libelous publication, without consulting them, all the defendants must be taken, for the purpose of this rule, to have known nothing of the insertion of the article complained of. The question is, whether the defendants, or either of them, are criminally responsible.

It is an undoubted principle of law, that a man is responsible, criminally, only for his own acts, or those authorized expressly by him through his appointed agent. It is not to be implied or inferred, from the fact that the defendants gave their editor a general authority to manage the paper as he thought proper, that they authorized him to do what was unlawful in the conduct of his ordinary business. Although this is the rule of law, there seems to have been introduced an exception with respect to libel. Lord Tenterden, at *Nisi Prius*, in 1829, following a previous direction of Lord Kenyon, and a statement of the law in Hawkins' Pleas of the Crown, laid down that a proprietor of a newspaper was criminally responsible for a libel, although he took no part in the publication of the newspaper, nor of the libel in question. He further proceeded to justify this ruling, and expatiated upon the danger to the public which its modification might cause. It is not necessary to say how far we dissent from that doctrine; it was considered an anomaly by high authority at the time, and I cannot doubt that the seventh section of Lord Campbell's act was passed to put an end to it.

It has been suggested that the object of this legislation was only to get rid of the presumption from particular evidence created by previous statute, or to apply to a case where the libel has been inserted by some one who had no authority to interfere at all with the publication. The answer to both these suggestions is, that the section was unnecessary for the accomplishment

of either of these objects; and I can come to no other conclusion than that it was intended by these words to reverse this anomaly, and to render libel subject to the general law. If, then, as I think, this provision was designed to protect the proprietor of a newspaper from criminal responsibility for the act of another person, committed through no fault of his and without his authority, does not the case here come within its application?

As to the defendant who was absent, he clearly is protected, unless the prosecution can show that his general authority to the editor expressly included power to publish libels. As to the other two defendants, the section provides protection from liability for a publication made without a publisher's authority, consent or knowledge, if he has exercised due care and caution; it would then be a question for the jury, looking at all the circumstances, whether those defendants can show themselves entitled to that protection.

If the jury should be in the defendants' favor on these points, they can neither of them be criminally liable. I say nothing about their position civilly, but it seems to me that the section can have no application at all if it does not apply to this case. It is not for us to say whether it is expedient or desirable that proprietors of newspapers should be freed from liability, under such circumstances, and I do not consider that question.

Simply, this section is, in my opinion, applicable to the facts upon which this rule has been granted. I think it must be made absolute, and the case must go back for a new trial.

MELLOR, J. I regret much that I am unable to concur with the lord chief justice and my brother Lush in their view of this matter. I dissent with the greatest diffidence, but I cannot think that the legislature intended to apply section seven of this act to persons situated as these defendants are. They do not, in the ordinary way, live at any distance from the publishing office, they do not keep away from the general management of the paper, and the whole business is conducted for their profit and by their authority. The editor might, by inadvertence, have published this libel, but the want of care would then deprive the publication of the protection given in the act. I think, too, that the absent partner is in the same position as the other two; they all gave their editor a general authority to do what he liked; they vested their discretion in him, they put themselves in his

hands, and they must be taken to have authorized whatever he has done. The seventh section requires not only the absence of authority, consent and knowledge, but also the presence of care and caution. I quite agree that, upon the evidence adduced at the trial, this libel must be taken to have been published without the knowledge of the defendants; but, to be exempt from liability, they must further prove that it was beyond the authority they had given to their editor, and that they were duly careful and cautious in respect of its publication.

If my brother Lindley took the view that the statute did not apply because the defendants could not show all or some of these conditions of exemption, he seems to me to have been right in his summing up and refusal to hear the evidence tendered.

Proprietors who take part in the management of their paper, but commit themselves to the discretion of an editor who is careless, cannot escape responsibility; but if the failure in care is not due to the proprietors themselves, or to the person whom they trust, then it may be that this clause applies. The defendants here take various parts in managing their paper, and the learned judge was right, in my opinion, if he said, upon the evidence before him, that the libel was published with the defendants' authority and consent, if not with their actual knowledge, and that the protection given by this section did not cover them unless they showed no want of care on the part of the editor.

The case, however, must go for a new trial upon the judgment of the majority of the court.

LUSH, J. There are two questions for our consideration: one as to the construction of the seventh section of Lord Campbell's act; the other, whether the evidence adduced at the trial was sufficient to justify the direction that this section did not protect the defendants. And, first, what was the object of this section?

The act professes to amend the law of libel, and to understand this particular provision, we must consider what was the state of the previous law. We find that a proprietor was then liable, criminally, for the publication of a libel in his paper without his knowledge or authority. This was admitted to be an anomaly, and felt to be a hardship.

The nuisance case cited is quite a different matter; that was a public injury for which there was no private remedy, whilst a

libel is a private injury for which a public remedy has been added to the existing private one. I do not feel at liberty to apply to this section the limited interpretation which has been suggested. What is the fair meaning of the words? They seem to me to exactly apply to a proprietor whose editor admits into the paper libels without his authority. The last part of the section must mean that a proprietor is bound to exercise proper care and caution in his appointment of an editor, and, if he does that, he is not responsible for the editor's acts done without his authority, consent or knowledge.

This is the remedy which the legislature would naturally apply to such an admitted anomaly as this rule of law was. There is ample protection for the public without injury to the proprietor. The evidence tendered in this case ought to have been admitted, and it might have been sufficient, as it seems to me, to have justified the jury in finding for the defendants.

Rule absolute for a new trial.

Solicitors for prosecution, *Gregory, Rowcliffe & Co.*, for John Howard, Portsmouth.

Solicitors for defense, *Ford & Ford.*

NOTE.—In *People v. Wilson* (64 Ill., 195, S. C., 1 Am. Cr., 107), the Supreme Court of Illinois punished the proprietors of a newspaper as for a criminal contempt, for an article published in their newspaper by an editor in their employ, the proprietors having no knowledge of the article until after its publication.

STATE V. JOAQUIN.

(69 Me., 218.)

PERJURY: *Endeavoring to induce a witness to swear falsely in a suit to be brought hereafter.*

A statute punishing any one who endeavors to procure a person to swear falsely "in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is authorized," does not extend to a case wherein a person, intending to commence a suit for damages, tried to induce a person to swear falsely in that suit when it should be tried.

It seems that if the false swearing, which it was sought to incite, would in itself constitute a proceeding, or be the first step in one, as in making a false complaint before a magistrate, the act of procuring the false oath to

be made would be indictable. In this case the indictment alleged in substance that the defendant intended to commence a suit for damages against one Fox, for killing his sheep, and that the defendant endeavored to incite one George to swear falsely on the trial of the suit, that he had seen Fox dogging the defendant's sheep.

PETERS, J. This indictment alleges that the respondent endeavored to procure another to commit perjury. The substance of the matter alleged is, that the respondent intended to commence a suit, or institute a proceeding, in which the perjury was to be committed.

We think the case is not reached by the statute on which the indictment is founded. The true rendering of the statute is, that a person shall be liable who endeavors to procure a person to swear falsely "in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is by law authorized." The objection is, that the suit or proceeding was not pending. It might never be commenced. Therefore it was an instigation to commit an offense upon a condition or contingency that might never happen. This was rather an ideal than a real offense, morally reprehensible, no doubt, but not such as the law sees fit to notice.

The county attorney ingeniously argues that, if the proceeding is pending it may never come on for trial, and that there is no more condition in the way of a suit being brought than there is of its being tried after it is pending in court. But there is a presumption that a case in court is to be tried or disposed of, a presumption of continuance, order or regularity in the course of judicial proceedings, while there is not a presumption that a person will consummate a crime that he may have had in contemplation.

No doubt, a person could be guilty, under the statute, of endeavoring to incite another to commit perjury where no proceeding is pending, but where the act done would itself constitute a proceeding. A man might be induced to go before a grand jury and falsely swear to a complaint. A pregnant woman might be instigated by another to go before a magistrate and falsely swear to proceedings against a man as the father of her bastard child, expected to be born. In such cases the acts of the foresworn parties would have the effect, *per se*, to institute proceedings. Mr. Chitty, in his Pleadings, has furnished precedents for such indictments. But here the instigation was not to

commence a proceeding by false swearing, but to swear falsely in some proceeding, provided at some time before some court, in some form, should one be commenced.

Demurrer sustained.

APPLETON, C. J., DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

STATE V. KILCREASE.

(6 Richardson S. C., 444.)

PRACTICE: *Quashing indictment not found on legal evidence.*

If an indictment is found on the testimony of witnesses who are not sworn in open court, the indictment will be quashed upon motion.

Indictment for murder.

The witnesses on the part of the state, upon whose testimony the indictment was found, were not sworn in open court before testifying, but were sworn by the grand jury, and on this ground a motion was made on behalf of the prisoner, before pleading, to quash the indictment. The motion was overruled, and the prisoner excepted. The prisoner was then put upon trial, convicted and sentenced, and he now appeals.

MOSES, C. J. The motion made in the court below to quash the indictment should have prevailed. The practice in this state, following the rule of the common law, which required that the witnesses on whose testimony the bill of indictment is to be passed upon by the grand jury must be sworn in open court, is coeval with its administration of the criminal law. So important has it been considered as one of the securities which, of right, belong to the accused, that the legislature has never attempted to deprive him of its enjoyment, or in any way to abridge the safeguards with which the common law surrounds a party charged by a bill with a wrong against the state. A grand jury, it is true, may either on their own information or that derived from other source, make a presentment on which a bill may be prepared and submitted by the prosecuting officer.

But, even then, the witnesses to sustain it are sworn in open court, and no other course has ever been pursued in this state.

It is true, in some of the states a change has been made by statute, but in South Carolina the rule of the common law has always been followed. In Chitty on Criminal Law (vol. 1, 322), it is said, "each witness, before he leaves the court, is sworn that the evidence he shall give to the grand inquest against the defendant shall be the truth, the whole truth, and nothing but the truth."

Mr. Archbold, in his first volume of Criminal Pleadings and Practice, page 98, says: "The witnesses must be sworn in open court, and during the time the court is sitting." See, also, Wharton's America's Criminal Law, sec. 488.

Neither the foreman of the grand jury, nor either of his fellows, is authorized, by the mere character of their office, to administer an oath, and it is more than questionable if perjury can be assigned on false swearing before them. If the witnesses are not sworn in open court, what guaranty has the accused that they were sworn before their evidence was taken? In the *United States v. Coolidge* (2 Gall., 364), it was held that if the grand jury receive the testimony of one not under oath, the indictment will be quashed.

If the forms and sanctions which have heretofore been recognized as the bulwarks of the trial by jury are not rigidly adhered to, the constitutional requisition that "it shall remain inviolate" will fail to accomplish the great objects it was intended to secure. No matter how strong the edifice may be, if the pillars on which it rests, one by one, are weakened, the great work, consecrated by time, must at last crumble into dust. It is safest to retain it in its pristine form and vigor.

As the motion must prevail on the ground first taken, it is not necessary to consider the other points raised by the appeal.

The motion to quash the indictment is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

STATE V. ROBINSON.

(2 Lea, Tenn., 114.)

PRACTICE: *Plea in abatement*—*Indictment not based on proper evidence*—*Former jeopardy*.

It is a good plea in abatement to an indictment that the prosecutor was not sworn to testify before the grand jury as to the matters alleged therein, but having been summoned before the grand jury to testify as to matters concerning which the grand jury possessed inquisitorial powers, gave testimony in that investigation, upon which the indictment was found.

Where the issue upon such a plea in abatement has been found in favor of the prisoner, and the jury has been discharged without having rendered a verdict upon the plea of not guilty, the prisoner should be held to answer a new indictment. The former indictment possessing no legal validity, the prisoner was never in legal jeopardy.

McFARLAND, J. To this indictment for larceny the defendant pleaded in abatement in substance that it was found upon the testimony of the prosecutor, who was not sworn to give testimony upon the indictment, but was summoned before the grand jury to testify as to offenses as to which the grand jury have inquisitorial power, and was sworn accordingly, and upon this examination testified in relation to this offense, and that afterward the indictment was drawn and found by the grand jury upon the testimony previously had by them in the manner stated. The jury were sworn to try the truth of this plea, and also to try the issue upon the defendant's plea of not guilty. They found the issue upon the plea in abatement in favor of the defendant, and the court thereupon discharged him, and the jury were discharged without rendering a verdict on the plea of not guilty, so far as appears, without the consent of defendant.

The attorney-general has appealed. The proof sustains the finding of the jury, which we think was a valid plea.

Judgment affirmed, but the prisoner should be held for another indictment, inasmuch as although the jury were sworn to try the defendant upon the plea of not guilty, and discharged without his consent, the indictment not being valid, he may be indicted and tried again.

NOTE.—For a number of cases in which indictments were quashed for grounds similar to those set up in the plea in abatement in this case, see note to *State v. Leitcham*, ante, p. 132.

INDEX.

ABORTION.

1. At the common law, the unlawful use of instruments or drugs upon a pregnant woman, though with her consent, for the purpose of producing an abortion, if it resulted in her death, was murder; while the statute reduces the crime to manslaughter in the second degree. *State v. Dickinson*, 1

2. *Res Gestæ*.

In a criminal action for producing the death of a pregnant woman by administering drugs or using an instrument upon her for the purpose of destroying the child, where it was shown that the deceased, shortly before the death, visited defendant's house, the court admitted evidence of conversations between the deceased and the witness, occurring about the time of such visits, in relation to the object for which they were made, but instructed the jury that they could consider such testimony only as it tended to show the purpose or intention with which the deceased visited the defendant, and not as evidence that defendant actually performed the acts charged. *Held*, that there was no error; proof of such visits being clearly admissible, and the other facts testified to being contemporaneous with the visits, and so connected with them as to illustrate their character, and being therefore a part of the *res gestæ*. *Ibid*.

3. *Dying declarations*.

In prosecutions for any form of homicide, the dying declarations of the person whose death is the subject of the charge, in respect to the circumstances of the death, are admissible in evidence, notwithstanding the clause in the bill of rights which secures to the accused the right to "meet the witnesses face to face." *Ibid*.

4. In a criminal case every material fact must be proved beyond a reasonable doubt; and, therefore, an instruction in an abortion case, that if the fact of the pregnancy and the time and place of the alleged crime are fully and clearly proven, and it is proved beyond a reasonable doubt that the defendant administered drugs or introduced instruments with intent to produce a miscarriage, he should be convicted, is erroneous. *State v. Stewart*, 603

ABSENT WITNESS.

It is only when a witness is dead that his evidence, given on the first trial of a criminal case, can be proved on the second trial of the same case. The fact that he is out of the state, and his residence unknown at the time of the second trial, does not make his former testimony competent. *Collins v. Commonwealth*, 289

See NOTE, p. 284.

ADMISSIONS AND CONFESSIONS.

W. was indicted for stealing \$150, the money of S. On the trial it was proved that J., a detective, arrested W., who made a confession, which was made under promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, and told them what W. had said, and they paid over to J., for S., \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed with them. The balance of the money, \$46, was paid over by the father of W. *Held*, it not being proved that the money paid to J. was the same lost by S., the statement of W. to J., and of what passed between J. and the gamblers and the father of W., is not competent evidence. *Williams v. Commonwealth.* 67

ADULTERY.

See NOTE, p. 175.

ARREST.

See ESCAPE; HOMICIDE.

ASSAULT AND BATTERY.

1. *Authority of superintendent of poor house.*

The superintendent of a county poor house has a right to use gentle and moderate physical coercion toward the inmates, so far as may be necessary, for the purpose of preserving quiet and subordination among the inmates, and is not guilty of assault and battery in so doing. *State v. Neff,* 176

2. Under an information charging an assault and battery, "with malicious intent to maim and disfigure," the jury found a verdict of "guilty as charged in the information, with the malicious intent as implied by law." *Held*, that this verdict was a verdict of guilty of assault and battery, and would support a judgment for that offense. *State v. Blood,* 631

ATTEMPT.

It seems that, under the statute, "whoever attempts to commit any offense prohibited by law, and does any act towards it, but fails," etc., "a bare solicitation is not an attempt, except it be such a solicitation whose immediate tendency is to provoke a breach of the peace, as a challenge to fight, or to the obstruction of or interference with public justice, as where perjury is advised," etc. *Cox v. People,* 839

AUTERFOIS ACQUIT.

See FORMER JEOPARDY.

AUTERFOIS CONVICT.

See FORMER JEOPARDY; LARCENY.

BASTARDY.

1. An objection that there was no evidence that the bastard was born or begotten in the state of Illinois, made for the first time in the Supreme Court, comes too late. *Hawkins v. People*, 178
2. An appeal lies in bastardy cases from the county to the circuit court, at the suit of the prosecuting witness *Ibid.*
3. Proceedings in a bastardy case are not abated by the death of the child, where the child was living at the time the proceedings were instituted. *Ibid.*
4. *Non-resident prosecutrix.*
Although the complainant in a bastardy case is not, and never has been, a resident of the state, and the child was begotten in another state, yet when the mother, while pregnant, comes into the state and institutes proceedings against the putative father in the county where he is found, her non-residence is no bar to the proceedings. *Kolbe v. People*, 177
5. *Security for costs.*
The statute of Illinois, requiring a non-resident plaintiff to give a bond for costs, does not apply to bastardy proceedings. *Ibid.*
6. In a bastardy proceeding the paternity of the child must be established beyond a reasonable doubt. *Baker v. State*, 608
But see NOTE, p. 608.
7. Where it appears, from the testimony of the prosecutrix, that she had sexual intercourse with two different persons so nearly the date of conception that either of them might be the father of the child, a conviction cannot be had, although the prosecutrix swears that conception resulted from the first act. It is impossible that she should know this. *Ibid.*

BIGAMY.

See NOTE, p. 175.

1. *Indictment.*
An indictment for bigamy, which does not allege the time and place, and the person to whom the respondent was first married, is bad on demurrer. *Davis v. Commonwealth*, 168
2. *Good faith.*
A record of divorce, which is incomplete on its face, is not admissible in a prosecution for bigamy, either for the purpose of disproving the charge in the indictment or for the purpose of establishing the good faith of the respondent, in contracting the alleged bigamous marriage. Her honest belief, that she had been lawfully divorced from her first husband, is no defense to the charge. *Ibid.*
3. *Bona fide belief of death of first husband.*
To an indictment for bigamy it is a good defense that, at the time of the bigamous marriage, the prisoner had a reasonable and bona fide belief that her husband was dead, although seven years had not elapsed since she last heard of him. *Regina v. Moore*, 608
4. *Marriage of a man whose wife had obtained a divorce for his misconduct.*
Under a statute which provides that a divorced person, "who is the guilty cause of such divorce," shall be deemed guilty of bigamy if he marries again during the lifetime of his divorced wife, such an one cannot be convicted of bigamy under an indictment which merely charges

bigamy in the ordinary manner. In such a case the indictment must allege the divorce, and that the defendant was the guilty cause thereof, and all the other facts necessary to bring the case within the terms of the statute. *Commonwealth v. Richardson*, 612

5. *Marriage by agreement of parties.*

It is improper to charge the jury that "a marriage was good without any ceremony, and by the mere consent of the parties, if the parties intended marriage, and that intent sufficiently appears." It is deficient in not adding that such consent and intent must be followed up by actual cohabitation thereunder as man and wife. *Taylor v. State*, 13

6. *Evidence of marriage.*

On a trial for bigamy, proof of the first marriage by the minister who solemnized the rites, and the marriage license, with his certificate thereon, is sufficient proof. It is not a valid objection that the minister was not properly ordained as a minister of the gospel, according to the rules and regulations of his church. *Ibid.*

7. Where, in bigamy, the first wife was known by two names, the question to be considered by the jury is the identity of the woman, and not her name, and it is proper for the court to so instruct the jury. It is the identity, and not the name, that is submitted to the jury. *Ibid.*

EVIDENCE OF MARRIAGE.

See NOTE, p. 17.

BLACKMAIL.

Indictment.

An indictment which alleges in substance that the respondent threatened to falsely accuse the prosecutor, through hand-bills and newspapers, of keeping a woman as his mistress, with intent to extort money or property from him, is sufficient under the Indiana statute: 2 R. S. 1876, p. 449. *Kistler v. State*, 18

BRIBERY.

An indictment, charging a prosecuting officer with receiving the promissory note of an accused person as a bribe to influence his official conduct in favor of the accused person in a criminal prosecution then pending, is bad. A promissory note, given for such a purpose, is absolutely void. To make out a case of bribery, it must be shown that the officer actually received something of value. *State v. Walls*, 23

BURGLARY.

A person, in the night season, entered a dwelling-house, without breaking, for the purpose of committing a felony, but broke out in making his escape. Held to be burglary. *State v. Ward*, 27

CHARACTER.

See REPUTATION.

CONFESSIONS.

See ADMISSIONS AND CONFESSIONS.

CONSPIRACY.

1. *Indictment.*

In an indictment or information for a conspiracy to do a lawful act by criminal means, the means must be particularly set forth. But if the conspiracy be to do an act in itself unlawful (whether at common law or by statute), the means by which it was to be accomplished need not be stated. *State v. Crowley*, 33

2. *Same.*

Thus, where the object of the conspiracy, as charged, was to obtain money from a certain person "by false pretenses, and by false and privy tokens and subtle means and devices," it was not necessary to state more specifically such pretenses, tokens or devices, the obtaining money on false pretenses being a crime by statute. *Ibid.*

CONSTITUTIONAL LAW.

It seems that, in Illinois, if the title of a bill fully covers the subject of a bill at the time that it passes the senate, and afterwards its title is amended in the senate by less than a majority of the senators elect, if the amended title fully embraces the objects of the bill, and the bill, with the amended title, is passed by the house of representatives, and is in that form constitutionally passed through that body, the law is constitutionally adopted. It is not necessary that the title by which the bill passes both houses should be the same, so long as both titles fully cover the object and purposes of the bill. *Johnson v. People*, 396

CONTEMPT.

1. Certain property having been replevied, while the suit was yet pending, the defendant in replevin took the property out of the possession of the plaintiff in replevin, and placed it beyond his reach and of the officers of the law. *Held*, that the court had power to order the property to be restored to the plaintiff, and to enforce the order in case of its disobedience by attachment for contempt. *Knott v. People*, 184

2. The respondent in an attachment for contempt having been heard, and his recognizance given to appear on a future day to abide the judgment of the court then to be delivered, cannot on that day file new affidavits and dispute the propriety of the rule which he has disobeyed. *Ibid.*

3. *Avoiding service of process.*

The return of an officer showing an attempted service of a subpoena on a witness, which could not be completed by reason of the witness running away, is a sufficient basis for the issuing of an attachment against the witness for his failure to appear in obedience to the subpoena. *Wilson v. State*, 183

4. *Conclusiveness of answer to rule to show cause.*

An attachment for a contempt in disobeying a subpoena having been served, the defendant filed a written statement under oath denying the facts constituting the alleged contempt, and disclaiming any intention of disobeying the process of the court. *Held*, that the answer of the respondent was conclusive, and that it was error to subject the respondent to an oral examination, or to hear evidence *aliunde* for the purpose of disproving the statement and establishing the alleged contempt. *Ibid.*

And see EXPERT WITNESS.

CONTINUANCE.

1. Where the affidavit of the prisoner for a continuance shows that he was arrested on the 9th, and being immediately indicted, was brought up for trial on the 14th, and alleges that he has had no opportunity to confer with counsel; that he is innocent of the crime charged, and that he cannot at once safely proceed to trial on account of the absence from the state of a witness whose name and residence are given, and the affidavit shows what facts the prisoner expects to prove by the witness, and the court can see that those facts are material to the defense, and the affidavit further alleges that the witness is not absent through the procurement of the prisoner, that he has used all possible diligence in endeavoring to get ready for trial, and that he expected to be able to procure the attendance of the witness at the next term of the court, it is error to refuse a continuance. *Conley v. People*, 445
2. A person indicted for unlawfully selling liquor to an Indian, which is a misdemeanor, demanded an immediate trial. The district attorney moved for a continuance, on an affidavit that he expected to prove all the material facts of the indictment by two witnesses whose attendance he could not now procure. Counsel for respondent offered to admit that the witnesses, if present, would testify as set forth in the affidavit. The court, upon this admission being made, refused a continuance, and proceeded with the case. *Held*, the defendant could, and did, in this case, waive his constitutional right to be confronted with the witness, and that the affidavit for a continuance was properly admitted in evidence against the defendant. *United States v. Sacramento*, 443

DISTURBING RELIGIOUS MEETING.

1. On the trial of an indictment for disturbing a religious congregation, it was in evidence that the defendant, either just before or shortly after the beginning of the services, rose up in the church and began to speak on matters connected with his expulsion from the church, which had occurred a short time previously; that the minister directed him to stop, when he declared he would be heard, and persisted in speaking until he was removed from the house; that he thereupon re-entered and resumed his speaking, notwithstanding repeated remonstrances from the minister, and by his conduct and voice so interrupted the services that the meeting was broken up. *Held*, that upon this evidence the jury were warranted in returning a verdict of guilty. *State v. Ramsay*, 133
2. On such trial, evidence as to "before what body the defendant was tried" was inadmissible; also, as to "how members of that church were tried and convicted;" also, as to the manner of defendant's expulsion and its propriety; also, as to whether the official board or the members of the church had, under its rules, authority to expel. *Ibid.*
3. On such trial, a witness introduced by the state testified, on cross-examination, that he had "taken the defendant to task for sowing the seeds of discord and spreading false views." *Held*, to be inadmissible to further inquire what those false views were. *Ibid.*
4. On such trial, it was admissible for the state to ask a witness "if it was a custom in this church for an expelled member to get up on the Sabbath day, just before or at the beginning of the regular service, and make known his grievances?" *Ibid.*
5. It is not necessary to constitute the offense of disturbing a religious congregation, that the congregation should be actually engaged in acts of religious worship at the time of the disturbance; it is sufficient if they are assembled for the purpose of worship, and are prevented therefrom by the acts of the defendant. *Ibid.*

6. Where, on such trial, the court charged, at the defendant's request, "that the act of disturbance must be wanton, intentional and contemptuous," but added "that the acts would be wanton if done without regard to consequences—that is, for some purpose of his own, and with intent to do them, whether he thereby disturbed the congregation or not." *Held*, not to be error: *State v. Jasper*, 4 Dev., 323; *State v. Swink*, 4 Dev. and Bal., 358; *State v. Fisher*, 3 Ire., 111; *State v. Linkhaw*, 69 N. C., 214, cited, distinguished and approved. *Ibid.*

DIVORCE.

See BIGAMY; FORNICATION.

DOG.

See LARCENY.

DYING DECLARATIONS.

1. On the trial of a case where it appeared that two persons were killed by the prisoner at the same time, and under the same circumstances, one of whom died instantly and the other survived a few hours, the prisoner being on trial for the murder of the one who died instantly, it was held error to admit in evidence the dying declarations of the one who survived a few hours, his death not being the subject of the charge. *State v. Bohan*, 278
2. Dying declarations can only be admitted in evidence when they relate to the act of killing, and the circumstances immediately attending it, and forming part of the *res gestæ*. *Collins v. Commonwealth*, 282
3. Where the fact of the killing was practically admitted, it was held error to admit dying declarations which were in substance as follows: "Michael Collins killed me, and killed me for nothing," and, "I never carried anything to hurt any one." *Ibid.*
4. Where dying declarations are offered in evidence, it is the province of the court to decide upon their competency, and where, before they are introduced, the respondent offers to prove that at the time the supposed dying declarations were made the deceased did not believe he was going to die, it is the duty of the court to hear this evidence and decide the question of fact before admitting the declarations. *State v. Elliott*, 322
5. Where dying declarations are admitted in evidence, the respondent has the right to show that the deceased did not believe in God, or in a future state. The declarations cannot be excluded on this ground, but this proof is material as affecting their credibility. *Ibid.*

See ABORTION; see, also, NOTE, p. 11.

ELECTION.

1. It is a matter within the discretion of the trial court, whether the district attorney shall be required to elect upon which of several counts in the information he will proceed, and the determination of that court will not be reversed, except for an abuse of discretion. *State v. Leicham*, 117
2. In an information under sec. 27, ch. 165, R. S., one count was for larceny by a fraudulent conversion of *chattels*, which came into defendant's possession as an agent, and a second count was for larceny by a like conversion of *money* received by him as such agent, and it was admitted that both counts were based upon the same transaction. *Held*, that there was no error in refusing to require the prosecution to elect, before the evidence was in, on which count it would proceed. *Ibid.*

EMBEZZLEMENT.

1. *Church collector.*

A collector of pew rents for a church, who is entitled to "five per cent of all the pew rents, no matter who collected them," is a joint owner, with the congregation, of the pew rents, and is not guilty of embezzlement in fraudulently converting the pew rents to his own use. They are not the property of *another*, within the meaning of statute against embezzlement. *State v. Kent*, 107

2. Where money is placed in the hands of the respondent, to be loaned for one year at ten per cent interest, and a part of it was by him converted to his own use, if the defendant acted merely as an agent in the matter he is guilty of embezzlement; but if he guarantees the payment of ten per cent interest, and is personally liable for the repayment of money, no embezzlement is committed. *Krebs v. People*, 1093. *Evidence of other acts.*

In a prosecution for embezzlement it is error to allow evidence to be given of other distinct embezzlements. *Ibid.*

4. *Hotel-keeper.*

Under the Michigan statute (Laws 1875, p. 195), making one to whom money, goods, or other property the subject of larceny shall have been delivered, and who shall embezzle or fraudulently convert the same to his own use, etc., guilty of larceny, it is a sufficient delivery of trunks and baggage, where the checks for the same are delivered to respondent, and he, acting under the authority which the delivery of such checks gave him, has assumed the right to, and has, exercised acts of possession and control over the trunks and baggage. *People v. Hubbard*, 111

5. *Same.*

The fact that a hotel-keeper, to whom checks for baggage have been delivered by a guest, would have a lien upon the baggage for the bill of such guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the same to his own use, or of itself preclude his being held under said statute, on the ground that he was a bailee, with a special property in the goods. *Ibid.*

6. *Same.*

And instructions to the jury, that in case they found defendant claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods, are as favorable in this regard to the respondent as he is entitled to demand. *Ibid.*

7. *By agent for sale of machines.*

Defendant being in possession of certain machines as agent of the owners for their sale, etc., and bound by his contract with them to sell upon certain terms and conditions, sold to M. some of said machines for the purpose of getting money from M. with which to pay, and with which, pursuant to a stipulation with M., he did immediately pay, an indebtedness of his own, for which M. was surety. M. took and held possession of the machines, having stipulated with defendant that the latter might purchase them back by repaying the money so advanced. These transactions were without the consent or knowledge of defendant's principals, and in violation of the terms of his contract with them, and he never accounted to them for such machines; and the evidence excluded the supposition that he did not know that the machines were

their property, which he was converting to his own use. *Held*, that the fact (if shown) that defendant believed, when he converted the property, that he would be able to pay, and intended to pay, the owners for it when he should be required to account for it, does not relieve the act of its fraudulent and criminal character. *State v. Leichum*, 117

8. The foregoing facts being proven, the court did not err in refusing to charge that if defendant so construed the written contract (with his employers) that he honestly supposed he had a right to sell machines and use the proceeds, and afterwards account to the owners; and if, in the transaction, he acted under that impression and in good faith, the jury should not find him guilty. *Ibid.*
9. Nor was it error to instruct the jury, in such a case, that if, at the time alleged, defendant sold any of said machines, or turned them out as security for the purpose of paying his own indebtedness, without the consent of his principals, he was guilty as charged in the first count of the information. *Ibid.*
10. The case distinguished from *Com. v. Stearns*, 2 Met., 343, and *Com. v. Libbey*, 11 *Id.*, 64, decided under a like statute, by the fact that there was here a special agency, and that the right of property and the possession remained in the principals. *Ibid.*
11. *Indictment.*
Under a statute against embezzlement, which provides that "whoever embezzles, etc., * * * shall be deemed guilty of larceny, an indictment charging simply an ordinary larceny is insufficient, and no conviction of an offense under the statute can lawfully be had. *Krebs v. People*, 114
12. *Same.*
An indictment, under such a statute, must set out the facts constituting the embezzlement, and then aver that so the defendant committed the larceny. *Ibid.*
13. Nothing which was larceny at common law is included within the statutes against embezzlement. *Ibid.*

And see NOTES, pp. 110 and 114.

ESCAPE.

1. *Illegal warrant.*
If the warrant by virtue of which an officer receives a prisoner is void, because the magistrate had no jurisdiction to issue the warrant on the affidavit made before him, the officer is not liable to prosecution for voluntarily permitting the prisoner to escape out of his custody, although the warrant is regular on its face. A warrant regular on its face, although illegally issued, is a protection to the officer who has no knowledge of the illegality of its issue, but such a warrant imposes no duty upon him. *Housh v. People*, 465
2. *Same.*
No warrant can legally be issued until a sworn complaint is made charging that a crime has been committed, and that there is probably cause to suspect that the person charged with the crime committed it. *Ibid.*
3. The affidavit on which the warrant issued in this case is held fatally defective. *Ibid.*

4. On the trial of a prosecution for aiding to escape from custody, the fact of custody is for the jury, and so, also, is the legality of that particular custody. The court should acquaint the jury with the needful rules of law, to enable them to distinguish legal from illegal custody, and let them make the application thereof to the facts in evidence. *Habersham v. State*, 45
5. It is error to charge that the custody was legal if the state's evidence is true, or that if the jury believe the evidence for the state, they must find a verdict of guilty. *Ibid.*
6. Custody by a private person after a legal arrest without warrant, becomes illegal if protracted for an unreasonable time, and whether the time was reasonable or unreasonable is a question for the jury, under proper instructions from the court as to the promptness which the law exacts in conveying the party arrested before a magistrate. *Ibid.*
7. Cruel treatment of his prisoner by the captor may be considered (where there is evidence on the point) to illustrate the purpose of the arrest and the *bona fides* of the custody. *Ibid.*
8. Custody voluntarily assumed by a private person without warrant, may be lawfully terminated with his consent, by turning the prisoner loose, especially if the latter be not guilty. *Ibid.*
9. To make the violation of a lawful custody criminal, its legal character need not be positively known to the offender, if he has good reason to believe it, or is grossly negligent in the use of means to inform himself. *Ibid.*
10. Actual guilt of the person held in custody for felony by a private person without warrant, is not indispensable to the legality of the custody, and, therefore, neither his conviction nor his prosecution is a prerequisite to convicting another for assisting him to escape. The question of his guilt is not otherwise involved than as throwing light upon the motive and lawfulness of his arrest, but for that purpose it is open to the consideration of the jury. *Ibid.*

And see HOMICIDE.

EXTRADITION.

1. The respondent was extradited from Canada, under the Ashburton treaty of 1842, to be tried on three separate indictments for forgery. On two of these he was tried and acquitted, and the third was dismissed. It was then sought to try him for embezzlement, there being then pending against him indictments for embezzlement and uttering forged paper. On motion of the respondent, based on affidavit showing the facts of the extradition, it was held that he was entitled to be discharged from arrest and afforded a reasonable opportunity to return to Canada before any proceedings could be taken against him on any charge not named in the warrant of extradition. *Commonwealth v. Hines*, 201
2. *Fugitives from justice.*
Although, under the constitution of the United States and the act of congress, a state is only bound to surrender a fugitive from justice for whom a requisition has been issued by the governor of a sister state, yet the legislature, upon principles of comity, may provide for the arrest and detention of such fugitive before the requisition has arrived, and may accompany the act for the arrest by as many conditions (favorable to the alleged fugitive) as to his mode of arrest and examination as it may see fit, and such act must be strictly complied with. *Ex parte Rosenblatt*, 215

And see NOTE, p. 213.

EXPERT WITNESS.

- A physician cannot lawfully be compelled to testify as an expert to matters of medical science, against his objection, unless compensated by a proper fee, as for a professional opinion; and his refusal to testify as to matters of medical science, without such compensation, cannot be punished as a contempt. *BIDDLE, C. J., and NIBLACK, J., dissenting. Buchman v. State,* 187

But see NOTE, p. 187.

EVIDENCE.

1. *General principles.*

The order in which evidence shall be given is within the discretion of the trial court, and evidence which is incompetent when admitted will not be a ground for reversal, if it is afterwards made competent, by its connection with evidence given at a later stage of the trial. *Carroll v. Commonwealth,* 290

2. The prosecution cannot show in the prisoner a tendency or disposition to commit the crime with which he is charged. *State v. Lapage,* 506

3. The prosecution cannot give in evidence other criminal acts of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing proposition. *Ibid.*

4. Even though the court permits an illegal or improper question to be put to witness, against the objection of the respondent, the respondent is not injured, and cannot complain, if the answer is one which does not prejudice him. *Archer v. State,* 404

5. Where there is a direct contradiction between two witnesses, it is for the jury to determine which is worthy of belief, and their determination ought not to be lightly disturbed. *Johnson v. People,* 396

6. The prosecution have a right to give in evidence against the respondent that he participated in making arrangements for one of the commonwealth's witnesses to leave the place at which the trial was in progress. *Collins v. Commonwealth,* 282

7. The court is not bound to instruct the jury that they must wholly reject the testimony of a witness who has sworn falsely in one material particular, even though such false swearing was willful. The matter of his credibility as to other matters is for the jury. *White v. State,* 454

8. *Guilty knowledge.*

When guilty knowledge is an ingredient of the offense, there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before engaging in a doubtful transaction.

The fact of guilty knowledge should be left to the jury to determine from all the circumstances. *Bonker v. People,* 79

9. *Cross-examination of respondent.*

Where the prisoner was on trial for the murder of one Brawn, and a witness in his own behalf; *held,* that on cross-examination it was not competent for the attorney for the state to ask him, against objection,

"Did you assault Mr. Farrer on the Calais road, while drunk?" and similar questions as to assaults upon other parties while drunk, the matter not being relevant to his credibility as a witness, or competent as substantive evidence. *State v. Carson*, 58

And see NOTE, p. 60.

10. *Accomplice.*

Where two jointly indicted are awarded separate trials, either is a competent witness for the state against the other, before he has been convicted or acquitted, and it is not necessary to enter a *nolle prosequi* to render him competent. *Carroll v. State*, 424

11. *Same.*

It is no objection to the competency of an accomplice who is called as a witness for the state that he has been assured by the judge and district attorney that so long as they remain in office his testimony shall not be used against him. *White v. State*, 454

12. *Same.*

The credibility of an accomplice is a matter solely for the jury. His testimony is to be weighed with great caution, jealousy and distrust, but the jury are to judge how far his testimony has been corroborated, and they may believe him without corroboration. *Ibid.*

13. Before a witness testifies in chief, counsel for the respondent has the right to examine her for the purpose of showing that she is not competent to testify, for want of intellectual capacity, and it is error to deny him this privilege on the ground that the judge has in another case investigated the matter and determined her to be competent. *Ibid.*

14. Ordinarily, counsel ought to have the right to confer in private, before the trial, with the witnesses they propose to call. And where the circumstances are such that this right can be exercised only by the consent of the court, it is error to refuse it. *Ibid.*

And see ADMISSIONS and CONFESSIONS, ABSENT WITNESS, DYING DECLARATIONS, HUSBAND and WIFE, LIQUOR SELLING.

FALSE PRETENSES.

1. *What constitutes the offense.*

In a prosecution for conspiracy to obtain money by false pretenses, if it appears that the transaction on the part of the person from whom the money was obtained, or from whom defendants conspired to obtain it, would have been *unlawful* in case the representations of the defendants had been *true*, there can be no conviction. *State v. Crocley*, 33

2. Thus, where money was paid by A. to certain conspirators to get possession of boxes, falsely represented by the latter to contain counterfeit money, with a view to uttering the same, and a further sum was paid to one of the confederates, who was a constable, to prevent a threatened arrest of A. for having such counterfeit money in possession (the boxes in fact containing only saw-dust), the confederates cannot be convicted, upon these facts, of a conspiracy to obtain money of A. upon false pretenses. *Ibid.*

3. Where, by the agreement between the prosecutor and the defendant, the defendant gets no title to the property which is delivered to him on the faith of the alleged false pretenses, the crime of obtaining property by false pretenses is not committed. *State v. Anderson*, 100

4. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor need the pretenses be the paramount cause of the delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with the property. *In re Snyder*, 228
5. A pretense which is false when made, but true by the act of the person making the same when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute. *Ibid.*
6. To hold a person for trial who is charged with obtaining money or property by false pretenses, it must appear that the pretenses relied upon relate to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient. *Ibid.*
7. A false statement that a house and lot were unincumbered, when, in fact, they were subject to a recorded mortgage, is not a false pretense within the statute, because the party defrauded had the means of detecting it at hand, and might have protected himself by the exercise of common prudence. *Commonwealth v. Grady*, 105
8. Statements as to the value of lots, or that they are "nicely located," are matters of opinion, and not facts, and, therefore, not within the statute. *People v. Jacobs*, 102
9. *Indictment.*
An indictment for obtaining goods by false pretenses is sufficient, if it allege that the goods were obtained by the defendant by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon them, and was induced thereby to part with the goods. *Norris v. State*, 85
10. In an information for false pretenses, it is not necessary to allege in express words that the party defrauded relied upon the false representations made, but this is a necessary implication from the allegation that he was induced by the false representations to part with his money. *People v. Jacobs*, 102
11. If any of the false representations charged in the information are matters of opinion, and immaterial, a charge that if the prosecutor parted with his money relying upon any of the false representations alleged, the offense is complete, without discriminating between those that are material and those that are immaterial, is erroneous. *Ibid.*
12. In section twelve of the crimes act, as amended February 21, 1873, declaring "that if any person, by any false pretense or pretenses, shall obtain from any other person," etc.; the word "person," in the latter phrase, includes artificial as well as natural persons. *Norris v. State*, 85
13. *Locality of crime.*
Where A., by false pretenses contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county, and the offense must be prosecuted therein. *Ibid.*

See LARCENY, and see NOTES, pp. 95, 102, 106 and 242.

FORGERY.

1. *The forged instrument.*

The false making, with fraudulent intent, of an instrument in the general form of a bank-check, requesting the bank to "pay W. T. C., Jr., or bearer, one fifty dollars in current funds," constitutes the crime of forgery, under section 1, ch. 166, R. S. *State v. Coyle*, 149

2. At the left upper corner of the check were the figures \$150.00. Whether this would authorize the court to supply the words "hundred and" between "one" and "fifty" in the body of the instrument, *quere*; but the check at least calls for the payment of fifty dollars, *Ibid.*3. The check is apparently a valid obligation; would create a liability if genuine, and, therefore, had a tendency to defraud. *Ibid.*4. An indictment charging that defendant forged, with intent to defraud, a written instrument as follows: "Due 8.25. Askew Brothers." Meaning thereby that eight dollars and twenty-five cents were due to him from Askew Brothers, which was a partnership composed of certain specified individuals, is not demurrable, and charges forgery in the second degree, under section 3702 of the Revised Code. *Rembert v. State*, 1415. A forged instrument was in the following terms: "AKRON, May 2, 1874. Mr. Schroeder: Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for. J. BUTLER." *Held*, that such instrument may be described in an indictment as an "order for the delivery of goods and chattels," within the meaning of the statute. *Childester v. State*, 1536. The word "value" in section 93 of the code of criminal procedure, is used in that section in the sense of "effect," "import," and not in the sense of "worth in money." *Ibid.*7. On the trial of a defendant, charged in an indictment with having forged such instrument, where evidence has been given tending to show that the defendant was not present when the forged instrument was made, it is error for the court to refuse to instruct the jury that if it be found by them that the defendant was not so present, he cannot be convicted of the offense charged in the indictment, or to instruct the jury that if it be found that the forged instrument was made by another person, by the procurement of the defendant, although he was not present at the forgery, he might be convicted of the offense charged in the indictment. *Ibid.*8. *Forgery by using an innocent agent.*

Where A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note, by falsely representing that C was authorized by B so to do. *Held*, that A was guilty of forgery. *Gregory v. State*, 146

9. *Variance.*

The indictment was for forging a promissory note which, as set forth in the indictment, contained these words: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest," etc. The note offered in evidence did not contain the words "and notice of protest." *Held*, a fatal variance, and that the note was not admissible in evidence. *Shurley v. State*, 168

FORMER JEOPARDY.

1. Defendant, having been tried and convicted, but the conviction being set aside because he was entitled to an acquittal on the evidence, cannot again be put in jeopardy of punishment for the same offense (Const., art. 1, sec. 8), and the trial court is, therefore, advised to arrest judgment and discharge him from custody. *State v. Moon*, 64
2. Where a person indicted for murder is found guilty of murder in the second degree, this verdict is, in legal effect, an acquittal of the charge of murder in the first degree. If he is granted a new trial he cannot, on the second trial, be convicted of murder in the first degree. *Johnson v. State*, 430
3. The constitutional provision that defendant shall not be twice put in jeopardy for the same offense, does not operate to prevent a new trial of a charge on which the defendant has been once convicted, after a new trial has been granted on his own motion. *Ibid.*
4. Where a plea of former acquittal is defective in form, the plea may be aided by the record, and should be sustained if the record of the court in the same case contains everything necessary to sustain it. *Ibid.*
5. The defendant, being on trial for a violation of the Sunday law, proved that he had before been convicted on his plea of guilty before a justice of the peace, and fined one dollar, for the identical offense then on trial. *Held*, that this was a complete bar to the pending prosecution. *Wilkinson v. State*, 596
6. To an indictment for shooting with intent to kill a human being, the respondent pleaded former acquittal. It appeared, from the plea, that he had been formerly prosecuted for maliciously shooting and wounding a horse, on which charge he had been acquitted, and the plea alleged the identity of the two offenses. *Held*, that a demurrer to this plea was properly sustained. The two offenses are essentially different, and could not be legally identical, although both offenses might have been committed in one and the same transaction. *State v. Horneman*, 427
7. A conviction under a city ordinance for "disturbing the peace," or for "fighting in the streets," cannot be pleaded in bar to an indictment in the circuit court for the assault and battery committed at the same time. The two offenses are not identical. *State v. Sly*, 51
8. A conviction for simple larceny of a hat (of the value of four dollars) is a bar to an indictment for larceny of the same from a shop, the stealing in both cases being one and the same. *State v. Wiles*, 621
9. If the jury come into court and render a verdict of guilty, and are discharged, in the absence of the prisoner, who is in the custody of an officer in another room, the prisoner is entitled to a new trial, but he is not entitled to a final discharge. *State v. Hays*, 630
10. The discharge of a person charged with felony on his examination before a committing magistrate, is no bar to a second examination before the same or a different magistrate, on another complaint charging the same offense. *Ex parte Gursd*, 618

See LARCENY; and see NOTES, pp. 53 and 67.

FORNICATION.

1. It is not in violation of the constitution of the United States to punish with greater severity fornication and adultery between persons of different races than between persons of the same race. *Ford v. State*, 161
2. On the trial of an indictment for fornication, it devolves upon the prosecution to prove that the respondents are unmarried. In the absence of any evidence on the subject, the law presumes that a man and woman openly living and cohabiting together are lawfully married. *Territory v. Whitcomb*, 159
3. The Indiana statute, which provides "that crimes and misdemeanors shall be defined," etc., is repealed *pro tanto* by a later statute, prescribing a punishment for a crime which it does not define, and therefore an indictment founded upon a statute punishing "open and notorious adultery or fornication" is good, although the statute does not define the crime. *Hood v. State*, 165
4. The courts of Utah have no jurisdiction to grant a divorce between residents and citizens of one of the United States, neither of whom is a resident of Utah at the time the divorce proceedings are had. *Ibid.*
5. Fornication, at the common law, is sexual intercourse between a man, married or single, and an unmarried woman. *Ibid.*
6. Adultery, at the common law, is sexual intercourse between a married woman and a man, married or single, other than her husband. *Ibid.*
7. The provision in the constitution of the United States, that "full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state," does not include judgments and decrees which show upon their face that the courts rendering them had no jurisdiction in the premises. *Ibid.*
8. The respondent had procured a divorce in Utah, which was void for want of jurisdiction. Relying upon this divorce he married and openly cohabited with another woman in Indiana. Held, that he was guilty of open and notorious fornication, and that his reliance on the Utah divorce was no defense, he being conclusively presumed to know the law. *Ibid.*

HABEAS CORPUS.

1. *Res adjudicata*.
Where a person confined by virtue of a sentence upon conviction for crime is discharged from such confinement on *habeas corpus*, by a judge having jurisdiction to determine the matter, on the ground of the alleged illegality of the sentence, the discharge being a judgment in favor of personal liberty, is final and conclusive. *Ex parte Jitz*, 217
2. *Same*.
In such a case the Supreme Court has no jurisdiction to re-examine the grounds on which a discharge was granted, and if the defendant is again arrested on the same conviction, the Supreme Court will release him on *habeas corpus*, on the ground that his right to be set at liberty under that conviction is *res adjudicata*. *Ibid.*
3. *To be admitted to bail*.
A party indicted for murder is entitled, upon proper application, to a writ of *habeas corpus* for the purpose of showing such facts as may satisfy the court that the proof is not strong, or the presumption is not great,

that he is guilty of a capital offense, and that he is entitled to be discharged on bail. The indictment charging a capital offense is not conclusive upon such application, under the statute, as to the character of the testimony. *Holley v. State*, 250

4. Practice on.

Under section 677 of the Kansas Code, Gen. Stat. 1868, p. 763, the judge or court issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, even in case there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. *In re Snyder*, 228

5. On the hearing and determination of a cause arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property. *Ibid.*

6. Where denied.

Where the facts stated in a petition for a writ of *habeas corpus* and the papers thereto annexed, if established, will not warrant the discharge of the prisoner, the writ will be denied. *Petition of Semler*, 242

7. Functions of writ.

The writ of *habeas corpus* is not designed to perform the office of an appeal or writ of error, and cannot be resorted to for the purpose of reviewing orders or judgments which are merely erroneous, made or rendered by a court which had jurisdiction of the subject matter and of the person. *Ibid.*

8. Thus, one who is imprisoned in default of bail, by order of a circuit court of this state, in which a criminal information is pending against him for embezzlement of moneys in his possession as county treasurer, will not be discharged by this court upon *habeas corpus*, on the ground that the information is insufficient to charge him with any offense, and that the circuit court erred in refusing to quash it for that reason. *Ibid.*

9. Where the petitioner also alleges that, upon a complaint subsequently made before a magistrate, he was held to bail and gave the bail required, and that the offense thus complained of was the same as that described in the information previously filed, but this court, upon inspecting such complaint and other papers annexed, cannot assume that the offense charged is the same, it denies the writ, with a suggestion that the circuit court, on the prisoner's application for that purpose, should inquire into the fact, and, upon finding it to be as alleged, should grant the proper relief in respect to bail. *Ibid.*

And see NOTE, p. 227.

HOMICIDE.

1. In a case where some of the evidence tended to show that the wound inflicted by the respondent upon the deceased was not necessarily fatal, but that by neglect of the directions of the physician in charge maggots got into the wound, causing inflammation of the bowels, from which the wounded person died, a request to charge that "if the jury find

that the wound inflicted by the defendant was not of itself mortal, but through negligence or want of proper treatment became so and terminated fatally, and that neglect or want of proper treatment was the immediate cause of the death of the deceased, and not the wound itself, they must acquit the defendant," was held properly refused. *Kee v. State*, 268

3. In such a case, it is proper to charge the jury that "if the jury believe, from the evidence, that the deceased, within the space of a year and a day from the infliction of the wound, died from some disease or disorder produced by said wound, inflicted by the voluntary act of the defendant, when not in danger of life or limb from the deceased, then they will find the defendant guilty as charged." *Ibid.*
3. *Held*, that there was no error in charging that "if the jury believe, from the evidence, that the defendant willfully and unlawfully inflicted upon the deceased a mortal or dangerous wound, and from that wound and other aggravating causes, operating upon or caused by said wound, the deceased died, they should find the defendant guilty, and the defendant cannot, under the law, shelter himself by a plea of erroneous treatment of the deceased, either from his physicians or nurses." *Ibid.*
4. *New-born infant—Independent life.*
An infant, although fully delivered, cannot be considered in law a human being and the subject of homicide until life, independent of the mother, exists; and the life of the infant is not independent, in the eyes of the law, until an independent circulation has become established. *State v. Winthrop*, 274
5. *Degree.*
To constitute the crime of murder in the first degree, deliberation and premeditation must be proven, and an instruction to the jury, defining murder in the first degree, which omits these elements, is erroneous: *State v. Foster*, 61 Mo., 548; *State v. Lane*, 64 Mo., 319. But where all the evidence shows that the killing was deliberate and premeditated, insanity being the only defense set up, the error does not prejudice the prisoner, and is not ground for reversal. *State v. Kring*, 813
6. It appeared that the defendant, intending merely to frighten the deceased, discharged a revolver at her and inflicted a mortal wound. The revolver had one load in it, but the defendant had reason to believe, and did believe, that it would not go off. *Held*, that on such facts no jury would be warranted in finding that a man of ordinary prudence could so conduct himself, and that a request to charge, based on that assumption, was properly refused. *State v. Hardie*, 326
7. The court charged the jury as follows: "And in this case I submit to you to find the facts of recklessness and carelessness under the evidence; and if you find that the death of the party was occasioned through the recklessness and carelessness of the defendant, then you should convict him (i. e., of manslaughter), and, if not, you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like circumstances, and if he did not use such care he should be convicted, otherwise he should be acquitted." *Held*, that this instruction was quite as favorable as the defendant was entitled to. *Ibid.*
8. *Self-defense.*
The ancient doctrine which required an assailed person, under all circumstances, to retreat as far as he could with safety, and avoid, if he pos-

sibly could, the necessity of taking human life in defense of his own life or in the protection of his person from great bodily harm, has been greatly modified by modern decisions. The weight of authority now is, that when a person, being without fault in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. *Runyan v. State*, 318

9. On the facts of this case it is considered by the court that there was no evidence tending to show that it was the duty of the accused to retreat before defending himself. *Ibid.*

10. The respondent was in a shed, the right of possession to which was in dispute between himself and the deceased. Angry words having passed between the parties, the deceased advanced with an ax on his shoulder to the shed in a threatening manner. The defendant warned the deceased not to enter, but without heeding this warning, the deceased advanced to the eve of the shed, almost if not quite within striking distance of the deceased, when the latter shot him with a pistol and killed him. *Held*, that if the respondent was lawfully in the shed attending to his business, and without blame, he was not bound to retreat even though he might have done so with safety, but might defend himself where he was, even to the taking of life, if necessary. *Erwin v. State*, 251

11. Where a man pursuing his lawful business and without any fault or blame on his own part, is *feloniously* assaulted, he is not bound to retreat even though he may do so with safety, but he may defend himself where he is, and if in his own defense he necessarily kills the felonious assaulter, the killing is justifiable homicide. If the assaulted party is himself at fault, he is bound to retreat as far as he can with safety, but if, having retreated as far as he can with safety, he necessarily kills his adversary to save himself from death or grievous bodily harm, the killing is excusable homicide. *Ibid.*

12. Where the circumstances of the killing are not disclosed by the evidence beyond the fact that it was done with a deadly weapon, the law presumes malice from the use of the deadly weapon; but where all the facts and circumstances attendant upon the killing are disclosed by the evidence, the inference of malice is to be drawn, if at all, by the jury from all the circumstances, of which the use of the deadly weapon is one. *Ibid.*

13. Where the evidence is conflicting, and a part of it tends to establish justifiable homicide in self-defense, a charge that, "in this case, the law raises a presumption of malice from the use of a deadly weapon," is erroneous. *Ibid.*

14. An instruction to the jury, from which they might infer that the prisoner was guilty of murder in the first degree, if he fired with a willful, deliberate and premeditated intent to take life, even though the defendant had a reasonable belief of bodily harm, and acting on that belief and apprehension of danger fired the fatal shot, is erroneous. *Pistorius v. Commonwealth*, 284

15. *Motive*.

In a trial for homicide, any evidence which fairly tends to prove a conspiracy between the prisoners to commit murder, and a motive for the murder, is admissible, although not tending directly to prove the murder charged, in a case where such testimony tends to corroborate and render more credible the testimony tending directly to prove the murder charged. *Carroll v. Commonwealth*, 290

16. *Threats by deceased.*

Circumstances tending to show hostility toward the defendant, on the part of the deceased, and threats made by the deceased against the defendant, but not communicated to him; *held*, properly excluded under the evidence in this case. *State v. Elliott*, 322

17. *Constable killing prisoner to prevent his escape.*

A constable has no right to kill a prisoner, in custody for a misdemeanor, to prevent his escape; and, if he does so, he will be guilty of murder or manslaughter, as the case may be. *Reneau v. State*, 624

And see DYING DECLARATIONS and NOTE, p. 273.

HOUSE OF ILL-FAME.

In order to render the defendant guilty of keeping a house of ill-fame, it must appear that he has some interest in it as such, or that he participates, or is authorized to participate in some way in its management. Proof that he is the owner and lessor of the house, and that he is frequently there, and stays there Sundays, is not sufficient. *State v. Pearsall*, 380

HUSBAND AND WIFE.

The wife of a respondent is not a competent witness for a co-respondent, who is being tried at the same time. *Territory v. Paul*, 332

INCEST.

1. Incest is not an indictable offense at common law, and where there is no statute against it, it is not a criminal offense. *State v. Keesler*, 331
2. In Illinois, a bare solicitation to commit incest is not indictable. Such a solicitation is not an attempt within the meaning of the statute. *Cox v. People*, 329

INSANITY.

1. The contents of letters written by the prisoner may be given in evidence to establish his sanity, where insanity is set up as a defense. *State v. Kring*, 313
2. It seems that moral, as contra-distinguished from mental, insanity, is insufficient to relieve a party from responsibility for crime. *Ibid.*

INTENT.

See MAYHEM.

JURY.

1. *General principles.*

It is error to charge the jury that they are in no sense judges of the law. *Habersham v. State*, 45

the part
e defend-
under the
322

meanor, to
murder or
624

ill-fame, it
the partici-
nagement.
t he is fre-
State v.
380

espondent,
332

there is no
er, 331

e. Such a
statute. Coz
329

in evidence
e. State v.
313

ty, is insuf-
Ibid.

of the law.
45

2. An erroneous overruling of a challenge for cause, is not reversible error, unless the prisoner exhausts his peremptory challenges, and is thus prevented from getting rid of the obnoxious juror by a peremptory challenge. *State v. Elliott*, 322
3. Where a juror who should have been rejected for cause is afterwards peremptorily challenged, and a full panel of impartial and acceptable jurors is obtained before the respondent has exhausted his peremptory challenges, the error does not prejudice him and is no ground for reversal. *Erwin v. State*, 251
4. Where the court has improperly overruled a challenge for cause, the error is ground for reversal, notwithstanding the juror is afterwards challenged peremptorily by the defendant, if the defendant exhausts his peremptory challenges, because the defendant has thereby been deprived of his right to peremptorily challenge one of the jurors who sat upon the trial. *State v. Brown*, 423
5. A defendant, in a criminal prosecution, cannot waive his right to a legal jury of twelve men, and a trial and conviction by less than that number, although by his consent, is illegal. *Allen v. State*, 441
6. A defendant in a criminal action may, with the consent of the state and court, waive a statute enacted for his benefit, or his right to be tried by a full jury of twelve. *State v. Kaufman*, 626
7. The jury ought not to be unfairly or unreasonably urged or coerced by the trial judge to an agreement. Such undue urging by the trial judge tends to produce compromise verdicts, which, in criminal trials, ought not to be tolerated. *Held*, that the language of the trial judge, in this case, tended to exert an undue influence and pressure upon the jury to reach an agreement, and probably did exert such an influence, since the jury found the defendant guilty of assault only, in a case where it was clear he should either have been convicted of assault with intent to commit murder, or wholly acquitted. *State v. Bybee*, 449
8. Where the jury are taken by order of the court to view the locality of the crime, the prisoner has a right to accompany them, and should be taken with them, unless he chooses to waive his privilege. (See *Benton v. State*, 30 Ark., 328, to the same effect.) *White v. State*, 454
9. That a juror, after being charged with a criminal case, was allowed to separate from the jury, is ground of new trial, unless it be affirmatively shown that he had no communication with any one upon the subject of the trial, either directly, by conversation, or indirectly, by overhearing the observation of others. *Daniel v. State*, 421
10. However improperly jurors may talk about a case in their deliberations upon it, and discuss things outside of the testimony, it would be erecting a standard too high, and would result in a defeat of justice, to set aside their verdict because they will do so. *Taylor v. State*, 13
11. The fact that the jury, pending the trial, were taken by the sheriff into a saloon, and treated by him to a drink of spirituous liquor, is not, of itself, sufficient ground for setting aside the verdict. *Kee v. State*, 263
12. That while taking refreshments at a hotel, pending the trial, two of the jury, being colored men, ate in a different room from the others, is not ground for a new trial. *Ibid.*

13. *Impartial Jury.*

On a trial for homicide, a juror who had formed or expressed an opinion that the deceased was killed by the prisoner, nothing else appearing, is incompetent to sit as a juror, and, on a challenge for cause, should be rejected. *State v. Brown*, 423

14. *Same.*

A juror who stated, on his examination on the *voir dire*, that his impression was that the respondent was more guilty than a co-respondent whom he knew had already been convicted; that it was merely an impression, founded on no facts, and that his mind was perfectly free to act justly; that his impression did not amount to an opinion, and was not such as would in the least influence his verdict, was held competent to sit. *White v. State*, 454

15. *Same.*

The trial judge may properly himself examine jurors as to their competency, and, on a murder trial, has a right to ask the jurors if they are opposed to capital punishment. *Ibid.*

16. It is not a legal objection to a juror, in the absence of any statute requiring an educational qualification, that he can neither read nor write. *Ibid.*17. The mere fact that a juror swears that he thinks the evidence might remove the opinion he has formed in answer to a question whether he could render an impartial verdict, does not make him a competent juror. He must swear unequivocally and positively, and the court must be able to determine him to be competent. On the facts of this case, a juror who was received was held to be clearly incompetent. *Carroll v. State*, 42418. Under the Ohio statute, it is error to overrule a challenge for cause to a juror who states that he has formed and expressed an opinion as to the guilt or innocence of the respondent, from reading a report of the testimony of the witnesses given on a former trial, even though he states also that he feels himself able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence. *Erwin v. State*, 251

And see NOTE, p. 262.

LARCENY.

1. *What is larceny.*

Where two conspire together to fraudulently obtain the money of the prosecutor, and, in pursuance of the conspiracy, make believe to throw dice with one another for money, and one of them, apparently losing, persuades the prosecutor to let him have his money to bet on the game, on the false assurance that he is sure to win and will give it back immediately, and if he loses he has a check for \$500 in his pocket which he will get cashed and repay the money, and the money is apparently lost, soon after which the confederates disappear, the two thus conspiring are guilty of larceny. *Loomis v. People*, 345

2. When a contract for the loan of money is induced by fraud and false pretenses of the borrower, and the lender, in performance of the contract, delivers certain bank-bills, without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false pretenses, but is not guilty of the crime of larceny. *Kellogg v. State*, 963. In the absence of a statute, the thief cannot be convicted of larceny in Ohio, for bringing into Ohio property stolen by him in Canada. *Stanley v. State*, 3494. *Dog.*

In Ohio, as at the common law, a dog is not the subject of larceny. (See Note, p. 340.) *State v. Lymus*, 338

5. *Lost goods.*

In a case where the defendant is charged with the larceny of lost goods, the defendant should be convicted, if it appears that, when he found them, he intended to appropriate them to his own use, having reasonable grounds for believing, at the time of the finding, that the owner could be found. *Baker v. State*, 337

6. *Stealing coffin.*

It is larceny, at common law, to steal a coffin in which a body is interred, and Missouri statutes, punishing disinterring and receiving the dead body, and opening the grave for the purpose of taking up the body or stealing the coffin, or anything buried with the deceased, in no wise abrogates or affects the common law rule. *State v. Doecke*, 638

7. In such a case it is proper for the indictment to allege the coffin to be the property of the one who furnished it for the burial. *Ibid.*

8. *Value.*

Where the value of the article stolen is material in a prosecution for larceny, its value is to be fixed by its market price, and not by what it is worth to its owner, or for the particular purpose for which it is used. It is to be regarded as worth just what it would fetch in the open market. *Ibid.*

9. *Larceny by bailee.*

Where the defendants received an accepted order for so many barrels of crude petroleum, which, at the time, was in the tanks and pipes of the Union pipe line company, mixed with petroleum belonging to many others, the defendants receiving the accepted order on an agreement to store the petroleum represented by the order at a specified rate per month, the delivery of the order is a delivery of the petroleum sufficient to constitute the defendants' bailees, and if by means of the order they draw and receive the petroleum from the pipe line company, and convert it to their own use, they are guilty of larceny as bailees. *Hutchinson v. Commonwealth*, 363

10. Where a person steals articles belonging to different persons at the same time and place, so that the whole constitutes but one transaction, he has committed but one larceny, and, after trial and conviction for stealing a part of the property, the conviction may be pleaded in bar of a second indictment, charging the larceny of the other property taken at the same time and place. *Wilson v. State*, 356

11. An indictment for simple larceny in stealing two hogs at the same time and place, though alleging that one is the property of one person, and the other of another, covers but one transaction and charges but one offense, and judgment thereon will not be arrested. *Lorne v. State*, 344

12. Proof that defendant stole one of the hogs is sufficient to convict under such an indictment. *Ibid.*

13. *Evidence.*

In prosecutions for larceny, if the owner of the property alleged to have been stolen is known, and his attendance as a witness can be procured, his testimony that the property was stolen is indispensable to a conviction: *State v. Morey*, 2 Wis., 494. *State v. Moon*, 64

14. In this case, the prosecution having failed to procure the attendance, as a witness, of the owner of the property alleged to have been stolen, or to show any effort to procure his attendance, and the secondary evidence of the fact, admitted by the court, being very weak and inconclusive, this court (to which the cause was certified after a verdict of guilty) advises the trial court that the evidence is insufficient to uphold the verdict. *Ibid.*

15. *Recent possession.*

The presumption or inference of guilt arising from the exclusive possession of stolen property, recently after the larceny, is purely a question of fact for the jury and it is error to charge that, from such recent possession, if not satisfactorily explained or accounted for by the defendant, the law presumes the guilt of the defendant. *Smith v. State*, 372

16. *Indictment—Description of money.*

An indictment for the larceny of money, which simply charges the stealing of "one hundred and thirty dollars," without any specific description of the kind of money, is bad on motion in arrest of judgment. *Barton v. State*, 340

And see NOTE, p. 335; FORMER JEOPARDY.

LETTING FOR ILLEGAL PURPOSES. *

1. Under a statute punishing the owner of premises for knowingly permitting them to be used or occupied for the purpose of prostitution, and conferring on the lessor power to avoid the lease and re-enter where the lessee does use the premises for such purpose, proof that the lessee does use the premises for such purpose, and that the lessor, having knowledge of the fact, takes no steps to avoid the lease, will not justify his conviction under the statute, in a case where the evidence shows that the lessor originally leased the premises without any knowledge or intent that they would be unlawfully used by the lessee. *Crofton v. State*, 378
2. Under such a statute, it is not necessary that the indictment should specifically aver that the premises were, in fact, used for purposes of prostitution. *Ibid.*
3. Under a statute which punishes one who authorizes or permits premises to be used for the sale of intoxicating liquors, the lessor is not guilty if he rented the premises for a lawful purpose, not knowing that they were to be used for the unlawful sale of intoxicating liquors, although he afterwards knew that they were so used, and took no steps to prevent their continued use for that purpose. *State v. Ballingull*, 376

LIBEL.

1. An indictment for libel, which charges that the libel is "as follows," and then sets it forth *verbatim*, with sufficient innuendoes, alleges the libel with sufficient certainty. *Clay v. People*, 381
2. An objection made in the Supreme Court that the libel proven is variant from that set forth in the indictment, will not be considered where no such objection is made in the court below. *Ibid.*
3. One who makes to a newspaper writer the statements of fact on which a libel is based, and, after the article is in type, hears the proofs read and affirms its truth and assents to its publication, is as guilty of libel as though he had written and published the article himself. *Ibid.*
4. *Criminal liability of publisher for act of servant.*

Upon a criminal information for libel, it was proved that the three defendants, the proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it. At the trial, evidence was tendered by the

defendants to prove that the libel was published without their authority, consent or knowledge, and without want of due care or caution on their part, within the meaning of 6 and 7 Vict., chap. 96, sec. 7. The judge refused to hear this evidence, and directed the jury that the section did not apply. Upon a rule for misdirection, *held*, by Cockburn, C. J., and Lush, J. (dissentiente Mellor, J.), that, notwithstanding the authority to the editor, it was a question for the jury whether the protection given by this section applied to the defendants, and that there must be a new trial. *Regina v. Holbrook*, 64;

LIQUOR SELLING.

1. The provisions of the liquor law, prohibiting the sale of liquor without a license, cannot be evaded by a saloon keeper's customers organizing a sham association, pretending to buy him out and electing him treasurer, and then letting him carry on his business with the members precisely as he did before, with the single exception that the so-called members, instead of paying cash for their drinks, purchase tickets at a dollar a piece, which are good for a dollar's worth of drinks, which tickets are punched for each drink had on them until the ticket is exhausted. The saloon keeper, not having a license, is properly convicted under the law. *Richard v. People*, 385
2. The evidence against the respondent, who was charged with selling liquor without a license, tended to show that he sold cigarettes, worth from a quarter to half a cent each, for ten cents a piece, and that he gave a drink of whisky to every one who bought a cigarette. *Held*, that this evidence fairly tended to show that the real transaction was a sale of the whisky, and that it was for the jury to say whether or not the pretended sale of the cigarettes was not a mere evasion and subterfuge, intended to cover the sale of the whisky. *Archer v. State*, 404
3. In such a case the prosecution have a right to press an unwilling and reluctant witness with searching questions, and to call out any and all facts which have any tendency to throw light on the real nature of the transaction. *Ibid.*
4. In such a case the defendant has no right to prove that in other cases he had treated people to whisky under circumstances that did not constitute the giving of the whisky a sale; or that he had, in some instances, refused to sell whisky either directly or covertly. Proving that he had not violated the law on other occasions would have no tendency to prove that he had not violated it in the matter for which he was being tried. *Ibid.*
5. Evidence of similar sales of cigarettes, and of the giving of whisky in connection therewith on other occasions, is admissible for the purpose of explaining the transaction in question in this case. *Ibid.*
6. Where it appears that one charged with selling liquor to minors was engaged in making change for sales made by others, and that he made change on the very sale in question, he is just as guilty as though he had sold the liquor himself. *Johnson v. People*, 396
7. In order to constitute an unlawful sale of liquor to a minor, under the Illinois statute, it is not necessary that the respondent, or any one connected with him, should be the keeper of a dram-shop. *Ibid.*
8. The act, title "Dram Shops," whose full title is, "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors" (R. S. of Ill., 1874, p. 438), is not aimed against, and does not include ordinary acts of hospitality. *Albrecht v. State*, 401

9. A brewer who gives beer to a person who comes to see him at his house on business, is not liable under the provisions of section six, which provides as follows: "Whoever, by himself or his agent or servant, shall sell or give any intoxicating liquor * * * to any person intoxicated, * * * shall, for each offense, be fined," etc., even though such person is under the influence of liquor. *Ibid.*

But see NOTE, p. 404.

10. *Evidence.*

The defendant, being a licensed saloon keeper, was charged with unlawfully selling liquor to a habitual drunkard. The only evidence against him was proof of a single unlawful sale by his clerk. *Held*, that this testimony was insufficient to justify a conviction, the presumption being that the clerk had authority only to make lawful sales. *State v. Mahoney*, 408

11. On the trial of the respondent for being a common seller of intoxicating liquors, a charge "that the jury could infer the fact of sales from circumstances, and the situation of the respondent, if they were satisfied to do so," is not erroneous. *State v. Hynes*, 392

12. On such a trial, where children have testified to going to the defendant's shop and purchasing liquor, it is proper to admit their mother to testify that they had been sent there for liquor, had been furnished with money and a bottle, and had gone out and returned with the liquor, although she did not herself know that they got it of the defendant. *Ibid.*

13. On a prosecution for selling liquor to a person in the habit of becoming intoxicated, where it has appeared that such person resides in the neighborhood of the respondent, and that he is in the habit of becoming intoxicated, the state has a right to give evidence of his general reputation in the neighborhood in that regard, for the purpose of proving knowledge of that habit on the part of the respondent. *Adams v. State*, 393

14. *What is malt liquor, a question of fact.*

Under the Maine statute, which provides that ale, porter, strong beer, lager beer, and all other malt liquors, shall be considered intoxicating liquors within the meaning of the act, what liquors are malt liquors within the meaning of the act, is a question of fact for the jury, and not of law for the court. *State v. Starr*, 390

15. *Indictment.*

Under a statute imposing a penalty for the sale of liquor to a minor, an indictment charging the sale of liquor, at a certain time and place, to "certain minors, the names of whom are to the grand jurors unknown," charges but one offense, and is not bad for duplicity. *Morgenstern v. Commonwealth*, 476

16. *Variance.*

Under a law punishing the sale of liquor to minors, the sale of the liquor to the minor is an offense against the person, and the name and identity of the person to whom the liquor was sold are material, and where the indictment alleges a sale to minors whose names are unknown to the grand jurors, if the evidence on the trial shows that the names of the minors were known to the grand jurors, the variance is fatal, and the defendant must be acquitted. *Ibid.*

And see NOTES, pp. 390, 391, 404 and 409.

MAYHEM.

1. *Intent.*

In criminal law, when a special intent, beyond the natural consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved and found. *State v. Bloodow*, 631

2. Where defendant had destroyed the eye of a person by throwing a stone at him, the information for mayhem charged the malicious intent in the words of the statute. Verdict that defendant was "guilty as charged in the information, with the malicious intent as implied by law." *Held*, that this does not find the malicious intent as a fact with sufficient certainty to sustain a judgment for mayhem. *Ibid.*

MARRIAGE.

Solemnization of unlawful marriages.

1. The Michigan statute (Comp. L., sec. 4729) makes it a misdemeanor for one to solemnize a marriage, knowing that he is not lawfully authorized to do so, or that there is a legal impediment thereto. *Held*, to apply to marriages not authorized by law, as where the girl is under the age of consent. *Bonker v. People*, 79
2. Where a justice joined in marriage a girl who professed to be of the age of consent, although she was apparently not, it was *held* competent to show that his family and her father's were neighbors and acquaintances, and that at her marriage he did not inquire for her parents, who were not present. These facts tended to show that he knew the girl's age. *Ibid.*
3. But it seems that a charge, that if the justice "had good reason to believe," or "if, in the exercise of a reasonable discretion, he had reason to believe" that the girl was under sixteen years of age, he is guilty, is erroneous. *Ibid.*
4. In a prosecution for unlawfully joining a minor in marriage, without the consent of her parent or guardian, the defendant has no right to show the size, appearance and general development, for the purpose of proving her age. The evidence is incompetent. *State v. Griffith*, 634
5. If such evidence is receivable in mitigation of punishment, its rejection will not be held error where the trial judge has already inflicted the lightest penalty provided by the statute. *Ibid.*
6. In a prosecution for unlawfully joining a minor in marriage, it is no defense, that the respondent acted in good faith, and that he honestly believed the minor to be of full age. *Ibid.*
7. *What is a negro.*
A marriage between a white man and a woman who is less than one-fourth of negro blood, however small this lesser quantity may be, is legal. *McPherson v. Commonwealth*, 636
8. A woman whose father was white and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute. *Ibid.*

And see BIGAMY.

NEW TRIAL.

1. The evidence in this case being purely circumstantial (consisting principally of a similarity between the tracks found near the scene of the arson and those of prisoner subsequently measured), slight in its nature, and not inconsistent with the innocence of the defendant, a new trial should have been granted. *Shannon v. State*, 56
2. Where a motion for a new trial is overruled by a different judge from the one who presided at the trial, the weight of the opinion of the latter in support of the verdict is wanting. *Ibid.*

And see NOTE, p. 58.

PERJURY.

1. A statute punishing any one who endeavors to procure a person to swear falsely "in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is authorized," does not extend to a case wherein a person, intending to commence a suit for damages, tried to induce a person to swear falsely in that suit when it should be tried, no suit having as yet been commenced. *State v. Jouquin*, 650
2. It seems that if the false swearing, which it was sought to incite, would in itself constitute a proceeding, or be the first step in one, as in making a false complaint before a magistrate, the act of endeavoring to procure the false oath to be made would be indictable. In this case the indictment alleged in substance that the defendant intended to commence a suit for damages against one Fox, for killing his sheep, and that the defendant endeavored to incite one George to swear falsely on the trial of the suit, that he had seen Fox dogging the defendant's sheep. *Ibid.*
3. *Sufficiency of evidence.*
 (On a trial for perjury, evidence simply that the defendant had at one time sworn to one state of facts, and afterwards changed his testimony, and, admitting that he had sworn falsely, testified in direct contradiction of his first statement, is not sufficient to justify his conviction. The prosecutor must prove which of the two statements is false, and must corroborate the true statement of the prisoner by independent evidence, i. e., by evidence other than his own statements and declarations. *Schwartz v. Commonwealth*, 410)
4. Under the New York statutes, the fire marshal of New York city has authority to investigate and examine into the origin of fires, and to take sworn evidence with relation thereto, on his own motion, and false swearing on such an investigation is perjury. On a prosecution for perjury for false testimony given on such an examination, it is of no consequence that no sworn complaint had been made to him. *Harris v. People*, 416
5. *Variance.*
 It was objected, in the appellate court, that there was a fatal variance between the indictment and the proof, the indictment alleging that the respondent had sworn that at the time of the fire he had sixty thousand cigars in the building, and the proof showing that he had sworn that he had sixty-five thousand cigars in the building. This objection was not made at the trial. *Held*, that the variance was not material; that if it was, it could not be regarded, the objection not having been made at the trial. *Ibid.*
6. There were two counts in the indictment, the first charging perjury in the oral testimony given before the marshal, and the second charging perjury in swearing to an affidavit before the same officer, containing, in

substance, the same matters testified to orally. The jury found the defendant not guilty under the first count, and guilty under the second. It was claimed that the verdict was fatally inconsistent. *Held*, that inasmuch as it appeared that the fire marshal was not present when all the oral testimony was given, there was no inconsistency in the verdict. *Ibid*.

PLEA.

See NOTE, p. 485; and see RECORD.

PLEADING.

See under, PRACTICE.

PRACTICE.

1. *Quashing indictment or information, for want of sufficient evidence, before the examining magistrate or grand jury.*

An indictment can only be based upon legal evidence adduced before the grand jury. The grand jury has no right to find an indictment, upon another indictment against the respondent for the same offense found by another grand jury at a previous term, which had been quashed. And, on a motion to quash, supported by evidence that the indictment was found solely on the former indictment, and without any other evidence, it should be quashed. *Sparrenberger v. State*, 470

2. *Same.*

The objection to the validity of an indictment, on the ground that it was found by the grand jury without any legal evidence, must be taken by a motion to quash, and not by a plea in abatement. *Ibid*.

3. *Same.*

It is a good plea in abatement to an indictment that the prosecutor was not sworn to testify before the grand jury as to the matters alleged therein, but having been summoned before the grand jury to testify as to matters concerning which the grand jury possessed inquisitorial powers, gave testimony in that investigation, upon which the indictment was found. *State v. Robinson*, 654

4. *Same.*

Where the issue upon such a plea in abatement has been found in favor of the prisoner, and the jury has been discharged without having rendered a verdict upon the plea of not guilty, the prisoner should be held to answer a new indictment. The former indictment possessing no legal validity, the prisoner was never in legal jeopardy. *Ibid*.

5. *Same.*

If an indictment is found on the testimony of witnesses who are not sworn in open court, the indictment will be quashed upon motion. *State v. Kilcrease*, 652

6. *Same.*

Since the amendment, in 1870, of sec. 8, art. 1, of the constitution of Wisconsin, the legislature seems to have full power to prescribe by whom, in what manner, and under what circumstances, an information may be exhibited against any person for any criminal offense. *State v. Leicham*, 117

7. *Same.*

▲ *formal adjudication*, after a preliminary examination by the committing magistrate, that the offense charged in the complaint has been committed, and that there is probable cause to believe the accused guilty thereof, is not required (R. S., ch. 176, sec. 19; Tay. Stats., 1920, sec. 19), as a basis for filing an information, but it is enough that, upon such examination (or a waiver thereof), the accused has been, by such magistrate, held to bail, or committed, to answer for an offense. *Ibid*.

8. *Same.*

Under ch. 190, of 1875, where the accused has been thus held to bail or committed, the information filed by the district attorney need not be for the offense charged in the complaint before the magistrate, but may be for any offense which the testimony taken on the examination shows the accused to have committed; but the district attorney may exhibit an information, as for a felony, if, in his opinion, the testimony so taken proves the accused guilty thereof, though the magistrate may find him guilty of a misdemeanor only. *Ibid.*

9. *Same.*

The fact that there has been a preliminary examination need not be stated in the information, or shown affirmatively by the prosecution (*Peterson v. The State*, unreported); and when the defendant relies upon the absence of such an examination, it seems that the better practice is to plead it in abatement before pleading to the merits; and, if issue is joined on such a plea, the burden of proof is upon the accused. *Ibid.*

And see NOTE, p. 132.

10. *Indictment.*

The indictment is sufficient, although it does not specifically allege that the crime charged was committed in the state of Kansas. *State v. Byhee*, 449

11. It is a general rule in criminal pleading, that if an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated, and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance. *Commonwealth v. Richardson*, 612

12. *Accriment of ownership.*

An indictment for burglary, which alleges a felonious breaking and entering of "the dwelling-house of the late Jno. Tate, now, etc., * * * belonging to the estate of the late Jno. Tate," and in the second count, "the dwelling-house of the estate of the late Jno. Tate," is fatally defective in not showing whose house was broken into. John Tate being dead, the house must of necessity belong to some one else, and this, for all that appears in the indictment, may be the respondent. *Beall v. State*, 463

13. *Conduct of trial.*

The trial judge must occupy the bench throughout the entire trial, which includes the argument of counsel. Where it is made to appear that, for two days during the argument, the judge was not in the court room, but in another part of the building, engaged in other business, and that members of the bar presided in his place, the verdict will be set aside, although this was done by consent of the respondent's counsel, or even by his own consent. The accused cannot waive the presence of the judge during his trial. *Meredeth v. People*, 448

14. *Same.*

It is error, for which a conviction will be reversed, to keep the prisoner shackled in court during his trial. *State v. Kring*, 313

15. *Same.*

Where, in a criminal prosecution, the defendant demurs to the evidence, he waives his right to have the jury pass upon the case; and it is proper for the court to discharge the jury and give judgment upon the whole case, upon the facts as well as upon the law. *Hutchinson v. Commonwealth*, 362

16. *The charge.*

Where the charge consists of several distinct propositions, some of which are correct, a general exception to the whole charge, and every part of

it, will not be considered by the appellate court. The party excepting should, at the time, point out definitely the part of the charge excepted to, and state the grounds of his exception. *Adams v. State*, 393

17. If the court, in a distinct proposition, states to the jury on what facts they may find the defendant guilty, and in that proposition entirely omits to direct the attention of the jury to the necessity of finding a felonious intent, it is error, although the court has in another part of the charge stated the law of larceny fully and correctly. *Territory v. Paul*, 332

18. On an indictment containing one count for robbery, and one charging assault with intent to rob, the respondent may be convicted of assault and battery, or of simple assault merely, and it is error for the court to refuse so to instruct the jury, when the instruction is asked for by respondent's counsel. *Howard v. State*, 448

19. *Order of proof.*

The trial court has a discretion to allow the prosecution to elicit, on cross-examination of the respondent's witnesses, material evidence in support of the case in chief, even though such witnesses did not testify as to such matters in their direct examination, and the judgment will not be reversed because that has been done, unless it appears that there was such an abuse of discretion as to deprive the respondent of a fair trial. *Adams v. State*, 393

20. Where, by an oversight, there was no formal allowance of a writ of error, but the court can see that it would and should have been allowed, on a motion to quash the writ of error for want of an order allowing it, the court will make the order of allowance *nunc pro tunc*. *Hutchinson v. Commonwealth*, 362

21. *Appeal only lies after final judgment.*

An appeal cannot be taken from an interlocutory judgment sustaining a demurrer to a plea of former acquittal. Appeal only lies after a trial upon the merits and final judgment. *State v. Horneman*, 427

22. Where a jury is sworn in a criminal case on the last day of term, the court has power to continue the trial from day to day after the term until it is terminated. *Carroll v. Commonwealth*, 290

23. *Repeal of the law pending appeal.*

Where the law under which the respondent is indicted is repealed, pending his appeal and before any final judgment has been pronounced, the repeal of the law abates the proceedings, and no judgment can be pronounced. *Smith v. State*, 48

24. *Discharge on account of delay of trial.*

Under a statute providing that a person under indictment who has given bail for his appearance, shall be discharged if not brought to trial before the end of the third term of the court in which the indictment is pending, *held*, after such indictment is found, unless the trial is postponed on his application, or because there is no time to try it at such third term, the respondent is not entitled to be discharged, where the trial is postponed from term to term without any objection on his part, although more than three terms pass without a trial. In order to get the benefit of the statute, the respondent must apply to the court for a trial or his discharge, and if the prosecution are ready to try the case at the term in which he applies for his discharge, but are prevented from trying it because there is not time to try it at that term of court, the respondent is not entitled to be discharged. *Ervin v. State*, 251

And see CONTINUANCE, FORMER JEOPARDY, JURY, NEW TRIAL, PROSECUTING COUNSEL, REASONABLE DOUBT, RECORD, REPUTATION, SENTENCE, VENUE.

PROSECUTING COUNSEL.

1. The prosecuting counsel has no right to argue to the jury that in a doubtful case it is safer to convict than to acquit, on the ground that an acquittal is final, but if the defendant is wrongfully convicted, the conviction will be set aside in a higher court, and the trial judge should not permit such an argument. *State v. Kring*, 313

And see NOTE, p. 317

The district attorney asked, and the court gave, a lengthy printed instruction to the jury, at the bottom of which the district attorney had written in pencil these words: "This is among a people of loose ways; try to elevate your race." *Held*, that if the testimony was in the least conflicting, or the guilt of the prisoner in any way left in doubt, the court should grant a new trial. But where it is impossible for the jury to have been misled by it, and the guilt of the accused established beyond all doubt, it is not sufficient for a reversal. *Taylor v. State*, 13

3. The rule requiring the prosecution to call every attainable witness, where testimony is needed to disclose any part of the transaction, is to prevent the suppression of evidence, and does not make it always necessary to call all witnesses, particularly where their testimony would be only cumulative, or where it appears that they abetted the commission of the offense, and the offense is not a crime of violence. *Bonker v. People*, 79

RAPE.

1. Force is an essential ingredient in the crime of rape, and a charge that if the defendant intended "to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged," is erroneous. *McNair v. State*, 583

And see NOTE, p. 585.

2. On a trial for rape, the admission in evidence of the statement of the sister of the prosecutrix, that the latter made complaint to her the next morning that the prisoner on trial, and another person named, forced her in her chamber the evening before, is held not error. *Brown v. People*, 586
3. Where, on a trial for rape, the act of intercourse is admitted, and the vital question is, whether it was by force and against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act; and, considering the place, time, occasion and surrounding circumstances disclosed by this case, it was important the jury should scrutinize the facts bearing on this point very closely. *Ibid.*
4. A charge to the jury in a rape case, that if they should find respondent used force, and complainant resisted so far as she was able to under the circumstances, they should find him guilty, even though they found she at last yielded, is held erroneous and misleading; the term "circumstances," as here used, may have been understood as including weakness of the will; and the term "yielded" as meaning an assent to the consummation or completion of the act; and, if there was a yielding in that sense, there was no case to support a verdict of guilty. *Ibid.*

5. The evidence on the part of the people being that the prosecutrix never yielded, and that on the part of the accused that she made no resistance, but assented from the beginning, there was no basis for a charge on the hypothesis of her having first made resistance, but afterwards yielded. *Ibid.*
6. The law conclusively presumes that a female child under ten years of age cannot and does not consent to an act of carnal intercourse, and it is not error to so instruct the jury. *Gosha v. State*, 589
7. A person charged with rape cannot be convicted on the uncorroborated evidence of the prosecutrix, who admits that she is unchaste, and who charges the defendant with having taken her from her room in the night, where another person was sleeping, and with having taken her two miles on horseback, where he committed the crime, and with having then carried her back to her room. *People v. Ardaga*, 590

REASONABLE DOUBT.

1. It is error to instruct a jury that "if the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law." *People v. Ah Ling*, 482
2. A charge that "in order to convict, the evidence should be such as to convince you, as reasonable men, that the charge is true. If, as reasonable men, guided by that prudence and reason which govern you in the ordinary conduct of your affairs, you have a doubt of the defendant's guilt, you should acquit," is erroneous. The jury might well have understood from it that if in their ordinary affairs they would, upon the evidence before them, adopt and act upon the hypothesis that the accused was guilty of the crime charged, they should convict him. *Anderson v. State*, 198
3. An instruction from which the jury may infer that a doubt is not a reasonable doubt unless it is shared by all the members of the jury, and that unless such a doubt exists the defendant should be convicted, is erroneous. Such a doubt must exist before there can be an acquittal (*State v. Kodabach*, 19 Iowa, 154), but there ought not to be a conviction so long as one or more of the jurors entertain a reasonable doubt of the defendant's guilt. *State v. Stewart*, 603

RECORD.

In a criminal case there is no issue formed, and can be no valid trial until the respondent has pleaded. Where a conviction has been had, without a plea having been entered, the conviction must be set aside, and the cause remanded, with directions to arraign the prisoner and proceed to a new trial, although the record shows that prior to the former trial, the respondent waived arraignment. *Hoskins v. People*, 484

REPUTATION.

1. A person on trial for crime has, in all cases, a right to give in his defense, evidence of his good character as to the particular traits involved in the matter on trial, and there is no case so clear in which it is not error to reject such evidence. *Kee v. State*, 263

2. It is error for a court to modify a request to charge that "evidence of good character is to be taken into consideration in determining the guilt or innocence of the accused" by adding, "but where guilt is positively proved, then good character will not benefit the defendant." Proof of good character is evidence to be weighed by the jury, on the question of the defendant's guilt, irrespective of the apparent conclusiveness or inconclusiveness of the other evidence. *Kistler v. State*, 18
3. The failure of a defendant to call witnesses to prove a previous good character, does not justify any presumption against him, and it is error for the court to instruct the jury that they have a right to consider it as a circumstance against him. *State v. Dockstader*, 469
4. The prosecution cannot attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character. *State v. Lapage*, 606
5. The prosecution cannot show the defendant's bad character by showing particular acts. *Ibid.*
6. The good reputation of the accused may be proved by witnesses who have never heard his character discussed. Negative evidence is competent, and the fact that a person's character is not talked about at all is often excellent evidence that he gives no occasion for censure, and that his character is good. *State v. Lee*, 332
7. The accused has a right to prove his real disposition and character (as to the traits involved in the case on trial) by the testimony of those who know what it is from their own personal observation. *Ibid.*
8. Where it appears affirmatively by the testimony of an impeaching witness, that he has some knowledge of the reputation of a witness, whose reputation for veracity he is called to discredit, it is error for the court to reject his testimony as to that reputation on the ground that his knowledge of that reputation is not sufficient. It is for the jury to judge of the weight of testimony. *Territory v. Paul*, 333
9. An impeaching witness may be cross-examined by the adverse party as to the extent and sources of his knowledge, before testifying to the reputation of the witness he is called to impeach. *Ibid.*

See LIQUOR SELLING.

SEDUCTION.

1. Under the Ohio statute against seduction of "any female of good repute for chastity, under the age of eighteen years," specific acts of lewdness and misconduct on the part of the prosecutrix with others than the respondent prior to the alleged seduction, are not admissible in evidence. Only proof of reputation is admissible. *Bowers v. State*, 592
2. The Ohio statute against seduction extends to all females under the age of eighteen years whose reputation for chastity is good, whether that reputation is deserved or not. *Ibid.*
3. A communication made by the prosecutrix to her attorney, in a consultation with regard to a bastardy proceeding which she had instituted, is privileged and cannot be given in evidence. *Ibid.*
4. For a case in which the court determined, as matter of law, that the evidence was insufficient to sustain a conviction, see *State v. Harves*, 594

5. In an action for the seduction of a girl thirteen years old, the omission of direct proof that she was not married, the question not having been raised on the trial, was held unimportant. At that age she could not lawfully be married. *Lewis v. People*, 75
6. In an action for seduction, evidence of the conduct and appearance of the parties on the day following the alleged offense is relevant to help ascertain whether it had been accomplished by seductive means. *Ibid.*
7. Where the prosecutrix, in a seduction case, has testified that defendant has told her that certain other girls allowed such liberties, it was proper to allow counsel for the prosecution to ask her their names, as evidence bearing on the means used in effecting the seduction. *Ibid.*
8. In the examination preliminary to a prosecution for seduction, the prosecutrix testified that defendant had offered her no inducement and made no promise, but, on the trial, she testified that he had protested his love and talked to her of marriage. *Held*, that it was reasonable to caution the jury, which had an opportunity to observe her, to consider her embarrassment on the examination, and her youth and degree of intelligence, and determine whether she would have volunteered to tell all that defendant had said to her about love and marriage, and whether she would consider it as a promise unless her attention was called to it, and to charge them that if they were satisfied that she had told the truth on the trial, and that defendant had induced her to consent, they should find him guilty. *Ibid.*

SELF-DEFENSE.

See HOMICIDE.

SENTENCE.

1. What sentence may be lawfully passed in any case can only be determined by the appellate court, after judgment has been pronounced in the court below. It cannot be determined on exceptions before judgment. *State v. Leicham*, 117
2. No court, without a special statutory authority, possesses the power to suspend sentence indefinitely. It is the duty of the court to pronounce judgment in the case of every person convicted. *People v. Morrisette*, 475
3. The extreme penalty of the law is only to be inflicted in the most aggravated cases. In this case the trial judge having imposed the extreme penalty of the law, in a case which was manifestly not of the most aggravated character, the term of imprisonment was reduced by the Supreme Court from ten to five years. *State v. Thompson*, 486
4. The constitutional provision that "cruel and unusual punishment shall not be inflicted" must be given effect by the courts, and where the trial judge imposes a sentence of excessive severity, judgment will be reversed and the cause remanded for a proper sentence to be imposed. *State v. Drier*, 487
5. On a conviction for assault and battery, a sentence of imprisonment in the county jail for five years, and at the expiration thereof to give security with sureties in the sum of \$500 to keep the peace for five years, is excessive and erroneous. *Ibid.*

6. Where the jury must fix the punishment of the respondent if they find him guilty, the respondent has a right to prove on the trial, in mitigation of punishment, that he has already been imprisoned on the same charge, for a long time, and the jury should consider such evidence in mitigation of punishment. *Kistler v. State*, 18
7. An indictment contained four counts, and a general verdict of guilty was returned. The court sentenced the defendant on the first two counts, and made no order continuing the case for sentence on the other counts. Afterwards, and at a subsequent term, the judgment not having been reversed, and the defendant, being imprisoned under it, was brought from prison on a *habeas corpus* and a fresh sentence imposed on him for the offense charged in the third count: *Held*, that the last sentence was erroneous and void. There can be but one judgment upon an indictment, and consequently a judgment and sentence upon one count definitely and conclusively disposes of the whole indictment, and operates as an acquittal upon, or discontinuance of the other counts. *Commonwealth v. Foster*, 499
8. Where a cumulative sentence of imprisonment is passed on a conviction on several counts, the judgment should not fix the day and hour on which each successive term of imprisonment should commence, but should simply direct that each successive term should begin on the expiration of the one preceding. *Johnson v. People*, 396
9. An appellate court, on reversing a judgment because the sentence imposed was not authorized by law, has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. *McDonald v. State*, 493

SUNDAY LAW.

1. The necessity which excuses and justifies common labor on Sunday need not be a physical or absolute necessity. If the labor is necessary, under the circumstances of any particular case, to be performed on Sunday, in order to accomplish any lawful purpose, it is not prohibited by the statute. *Wilkinson v. State*, 596
2. A fruit-grower may lawfully pick his fruit on Sunday, and haul it on the way to a Monday's market, if without such labor on Sunday his crop would be lost to him by spoiling before he could get it to a market. *Ibid.*
3. The word shop is not equivalent to the word store, and indictment charging the defendant with keeping "open shop" on Sunday, does not charge any offense under a statute prohibiting keeping "open store" on Sunday. *Sparrenberger v. State*, 470

VARIANCE.

See FORGERY.

VALUE.

See LARCENY.

VENUE.

1. It is not error to refuse a charge of venue on the ground of prejudice in the community, where the *prima facie* case made by the affidavits filed by the respondent is fully answered and clearly overcome by the affidavits filed in reply by the state. *State v. Bohan*, 278
2. The venue must be proven as laid. Where the only evidence was that the act occurred within fifty yards of a house in Sumter county, the evidence was held insufficient, as the house might have been within twenty yards of the county line. *Gosha v. State*, 589
3. In this case the court gives effect to a technical objection more readily, because of the undue severity of the sentence imposed. *Ibid.*
4. Under the Nebraska statute, providing for a change of venue, but one change of venue can be had for the same cause, in the same proceeding. *Ex parte Garst*, 618

VERDICT.

See MAYHEM ; FORMER JEOPARDY.

WAIVER.

See JURY.

WARRANT.

An officer, armed with process for the arrest of a person in a civil suit, cannot take the defendant from the hands of another officer who holds him on a warrant issued in a criminal case; nor can he hold such person as against one armed with a criminal warrant, and the same rule applies to a proceeding under a requisition from the governor of another state asking for his return as a fugitive from justice. *Ex parte Rosenblatt*, 215

See ESCAPE; HOMICIDE.